Custom Window Extrusions, Inc. *and* United Electrical, Radio and Machine Workers of America (UE). Case 6–CA–25151

August 24, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On November 12, 1993, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.

The Respondent excepts, inter alia, to the judge's finding that it violated Section 8(a)(1) of the Act by informing its employees by letter of October 14, 1992,[2] that it would be futile for them to select the Union as their bargaining representative. The letter was sent during a time when the Union was engaged in organizing activities aimed at the Respondent's workers. We find merit in this exception of the Respondent and reverse the judge's finding that this letter unlawfully conveyed to employees that their selection of the Union would be futile.[3]

The relevant language of the October 14 letter is as follows:

> FACT: Only the Company can raise wages. All the Union can do is call a strike in an attempt to force the Company to do something.
>
> FACT: By striking, a union is gambling with its members' future, hoping that it can shut off shipments to the employer's customers to gain leverage in the negotiations.
>
> FACT: [the Respondent] is a member of the Royal Plastics Group. If our production is interrupted in Delmont, our customers can easily be supplied from other plants, both in the United States and Canada.
>
> FACT: Once negotiations start, all things are negotiable and *wages and benefits can and often do go down because the union ''trades them'' for other things like a union security or dues checkoff provision*. [Emphasis in the original.]

The General Counsel argued before the judge that the first paragraph implied to employees that union representation would be futile through its suggestion that the Union could not improve employees' wages except by striking. The Respondent asserted that there was no violation because nowhere in the document did it state that a strike would be inevitable or that the Respondent would not negotiate with the Union.

The judge found that the Respondent's assertion that, ''only the Company can raise wages, all the union can do is call a strike in an attempt to force the Company to do something,'' was an unlawful statement of futility, because it implied that the Union can make all the demands it wants but the employer does not have to agree to anything. He cited *Seville Flexpack Corp.*, 288 NLRB 518, 534–535 (1988), in which the Board found that the employer violated Section 8(a)(1) by stating to its employees that the union had two choices in the face of a final offer by the company, accepting the offer or going out on strike. There, the employer asserted that in negotiations, the union could make all the demands it wanted but the employer did not have to agree to a thing. The Board adopted the judge's reasoning that by telling employees that it did not have to agree to any union demands, even before any were made, the employer informed employees that its own intransigence and ''not economic necessity or the give-and-take of negotiations—would render it useless to support a union.'' 288 NLRB at 535. The Board agreed with the judge that this expression of employer intransigence was unlawful.

We find *Seville Flexpack* distinguishable from the instant case, because in that case the employer official who made the remarks made no mention of bargaining in good faith, instead stressing that its role in negotiations was going to be to make a take-it-or-leave-it offer, which the union could either take or strike. To drive the point home, he followed up these remarks by noting that ''bitter strikes have long been the hallmark of the printing and publishing industry,'' and by referring to several examples of failed strikes involving the same international union.

By contrast, in the instant case, the October 14 letter stated that all things were negotiable. It went on to state that even though ''wages and benefits can and often do go down,'' this was not due to employer in-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We grant the General Counsel's motion to correct an inadvertent error in the administrative law judge's decision. We find no merit to the Respondent's argument that it was denied an opportunity to present relevant evidence.

[2] All dates are in 1992 unless otherwise noted.

[3] The complaint also alleged that a similar notice posted on October 20 violated the Act. The judge made no findings with respect to this notice, and the General Counsel did not except to the failure to find a separate violation. Thus, it is unnecessary for us to pass on this allegation.

transigence, but to the parties bargaining for other concessions. Thus, the Respondent gave no indication that it planned to bargain in bad faith or issue take-it-or-leave-it offers, but instead allowed for the eventuality that negotiations would determine what happened in the employees' workplace, were a union to be elected.

We find the facts of this case to be closer to those found in *Fern Terrace Lodge*, 297 NLRB 8 (1989). There, the Board reversed the judge's finding that the following speech to employees was unlawful under Section 8(a)(1):

> You should know that voting the union in does not automatically guarantee any increase in wages or other benefits, because under the law a company does not have to agree to any demand or proposal that a union might make. Even if it got in here, a union couldn't force us to agree to anything that we could not see our way clear to putting into effect from a business standpoint.
>
> . . . .
>
> [W]e have just as much right under the law to ask that wages and other employee benefits be reduced as the union would have to ask that they be increased.

The Board found that the employer's speech to the employees implied no futility, but was in fact an accurate statement of the law. As in the case at bar, this language makes the point that voting in a union will not result in automatic increases in wages and benefits; such things may or may not result from the bargaining process.

Although the letter at issue here, unlike the speech in *Fern Terrace Lodge*, mentions a union's resort to striking to secure its aims, we see no critical distinction between the cases. As noted above, the Respondent's reference to strikes as a Union's option to ''attempt to force the Company to do something'' is qualified in the same document by statements that ''all things are negotiable'' and that if wages and benefits were negotiated ''down,'' it might be because the Union traded them off in the bargaining process for other things. In short, taken as a whole, the Respondent's letter indicates that the Respondent will participate in the bargaining process even without the pressure of a strike and that results of the process could be dictated by tradeoffs agreed to by the parties. Such a description of the bargaining process, albeit skewed in the service of the Respondent's campaign effort to encourage votes against the Union, is an expression of opinion protected by Section 8(c) of the Act and therefore is not a violation of Section 8(a)(1).

In all other respects, we adopt the decision of the administrative law judge.[4]

AMENDED CONCLUSION OF LAW

Delete Conclusion of Law 6 and renumber the remaining paragraphs accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Custom Window Extrusions, Inc., Delmont, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 1(c).

''(c) Threatening its employees with closure of the plant if they supported the Union; soliciting employee complaints and grievances and impliedly promising to rectify them by improving benefits, terms, and conditions of employment; informing employees that unionization would have detrimental results concerning their terms and conditions of employment; and threatening employees with nonspecific threats of reprisals if the Union came in.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminate against unit employees by disciplining or discharging them because of their activities on behalf of and in support of United Elec-

[4] Member Browning, dissenting in part, would adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by informing its employees, in its October 14, 1992 letter, that it would be futile for them to select the Union as their bargaining representative. Member Browning agrees with the judge that *Seville Flexpack Corp.*, 288 NLRB 518, 534–535 (1988), is dispositive of this issue. In that case, as in this one, the respondent informed its employees that it did not have to agree to any wage demands, and that the only action which the union could take to increase wages for the employees would be to strike. Moreover, as in *Seville Flexpack*, the Respondent in this case made these statements in the context of other coercive and unlawful actions. In fact, the Respondent issued its letter to the employees on the same day that it unlawfully discharged a leading union supporter. In Member Browning's view, *Fern Terrace Lodge*, 297 NLRB 8 (1989), relied on by the majority, is clearly distinguishable. There, the respondent simply informed its employees, accurately, that the law did not require it to agree to any union demands, and that the employer had the right to ask, during negotiations, that wages be reduced. Unlike in this case, there was no implication that the respondent would not agree to any union demands for a wage increase, and that the only action that the union could take in that event would be to strike. For all these reasons, Member Browning would adopt the judge's conclusion that the Respondent's letter of October 14, read in its entirety and in context, clearly imparted the message that selecting the Union would be futile, and thus violated Sec. 8(a)(1) of the Act.

trical, Radio and Machine Workers of America (UE), a labor organization, or any other labor organization.

WE WILL NOT coercively interrogate our employees concerning their membership in, sympathy for, or activities on behalf of the Union.

WE WILL NOT threaten our employees with closing the plant or nonspecific threats of reprisals if they support the Union or if the Union comes in.

WE WILL NOT solicit our employees concerning their complaints and grievances, impliedly promising to increase benefits and improve their terms and conditions of employment if they abandoned support for and sympathy for the Union, or any other labor organization.

WE WILL NOT inform our employees that unionization would have detrimental results concerning their terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer to Robert Penman, unlawfully terminated on October 14, 1992, immediate and full reinstatement to his former position of employment at our Delmont, Pennsylvania location, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges he previously enjoyed, and WE WILL make him whole, with interest, for any loss of earnings or benefits he may have suffered by reason of our unlawful discharge of him on October 14, 1992.

WE WILL expunge and remove from our files any memoranda, records, or other references to our unlawful warnings and discipline of Robert Penman in the period September to October 14, 1992, and notify him, in writing, that this has been done and that disciplinary action will not be used against him in any way.

CUSTOM WINDOW EXTRUSIONS, INC.

Janice A. Sauchin, Esq., for the General Counsel.
Mark E. Scott, Esq., of Bridgeville, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard in Pittsburgh, Pennsylvania, August 5, 6, and 10, 1993, on General Counsel's complaint, as amended at the hearing, which alleges, in substance, that the above-captioned Custom Window Extrusions, Inc. (Respondent) committed independent violations of Section 8(a)(1) of the Act by various statements and actions of its supervisors, including documents distributed among Respondent's employees; and Section 8(a)(3) of the Act by unlawful disciplining and termination of its employee, Robert Penman, on August 14, 1992.

Respondent filed a timely answer to the General Counsel's complaint wherein it denied certain allegations, admitted others, but denied the commission of unfair labor practices.[1] It avers that it discharged Penman solely because he violated Respondent's ''no fault'' absentee rules.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant, oral, and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to submit posthearing briefs which have been received and carefully considered.

On the entire record, including the briefs and on my most particular observation of the demeanor of the witnesses as they testified, comparing their testimony to testimony of adverse witnesses, the interest of the witnesses, and the credibility of the testimony in the light of the surrounding circumstances, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

The complaint alleges, Respondent admits, and I find that, at all material times, Respondent, a Pennsylvania corporation with an office and place of business in Delmont, Pennsylvania, has been engaged in the manufacture and distribution of vinyl extrusions used in the manufacture of window frames and other window treatments. During the 12-month period ending November 30, 1992, Respondent, in the course and conduct of its business operations above described, purchased and received at its Delmont, Pennsylvania facility goods valued in excess of $50,000 shipped directly from points outside the Commonwealth of Pennsylvania. Respondent concedes, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges and Respondent admits that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.[2]

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[1] Respondent admitted the timely filing and service of the underlying unfair labor practice charges by United Electrical, Radio and Machine Workers of America (UE) (the Union or the Charging Party): the original charge was filed on December 23, 1992, and served on Respondent on December 26, 1992; and the amended charge was filed and served on April 28, 1993. In addition, I grant General Counsel's unopposed motion to correct the transcript.

[2] In its answer, Respondent admits that the following persons are Respondent's supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act: Ernest Felt, president; Angelo Laquatra, vice president; Robert White, assistant production manager; Heather Werner, administrative assistant; Dan Porembka, production manager; Bradford Mourant, tooling manager; Tony Leppo, foreman; and Leonard Feather, purchasing scheduler. At the hearing, Respondent conceded that its ''salaried supervisors,'' Chuck Dowling and Gomer Ralph, were also statutory supervisors and agents within the meaning of the Act. As many as eight production employees as well as assistant foremen reported to the ''salaried supervisors'' (known as ''foremen'' until 1991); they give work orders to the employees under them, change the nature of the work orders, and effectively recommend discipline to the production manager or assistant production manager.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent manufactures sections of vinyl frames and sashes for replacement windows which it sells to manufacturers of replacement windows. The production process passes a taffy-like plastic through a die, then cooled and cut to length by extrusion machine operators each operating three to four machines at a time.

Machine operators require a minimum of a year of experience and training for even reasonable skilled performance, such fledgling machine operators being called ''C'' operators. As the operator learns to maintain and adjust the delicate production machinery (''very temperamental machines,'' G.C. Exh. 26, p. 6), the operator is promoted to operator status ''B.'' Such operators are capable of operating and maintaining the machinery with some degree of independence. Two, or more, additional years of experience are required of the ''B'' operator to become an ''A'' operator. The ''A'' operators can do original setup work. There must be at least one ''A'' operator as well as a shift supervisor or assistant shift supervisor on each shift.

All machine operators must eventually be capable of acting as ''die shooters.'' The die shooter attaches the die directly to the machines through which the extruded plastic material flows. An operator with extruder experience and aptitude for machine shop work works well as a die shooter.

In addition to ''die shooters,'' there is the rarer classification of ''die tuner.'' The ''die tuner,'' acting as a liaison between Respondent's tool or machine shop and its production floor, corrects problems which arise from the flow of the material through the dies causing uneven walls in the extruded product. The die tuners fine-tune the dies, not on the production floor, but in the machine shop or tool shop.

Unlike any other employee in Respondent's employ[3] only Robert Penman, the alleged discriminatee, was an ''A'' operator, a die shooter, and a die tuner.

In January 1992, Respondent terminated its then production manager, Jim Bentley, because he was unwilling to put in the number of hours required of the production manager and because he was constantly late to work (Tr. 493; 498). Prior to being discharged on October 14, 1992, Penman was transferred to the midnight shift because he could run machines, tune dies, and shoot dies with the least amount of support and supervision. No other employee could do this according to Vice President Laquatra (G.C. Exh. 26, pp. 8–9). Indeed, Vice President Laquatra said that Penman was the ''de facto'' assistant production manager on the night shift (G.C. Exh. 26, p. 9).

B. *Robert Penman*

1. There is no dispute that Angelo Laquatra, Respondent's vice president (son-in-law of Respondent's president, Ernest Felt) and Robert Penman have been friends for more than 10 years, indeed, from time-to-time, drinking buddies. Their socializing, however, slackened in recent times due to Laquatra's domestic obligations. This did not prevent Penman from calling on Laquatra to bail him out of jail in the summer of 1992. Laquatra used his own money to provide the bail.

2. Both Laquatra and Penman were employed by Poly-Tex Company (now known as Chelsea Industries) prior to the formation of Respondent; Laquatra as production accountant and Penman in charge of the warehouse. In 1985, Felt, Laquatra, and Leonard Feather left Poly-Tex to form Respondent. Respondent hired Penman as its first and only production employee in 1985. He has therefore been steadily employed by Respondent for 8 years. Although Laquatra and Feather are shareholders in Respondent, the controlling interest is owned by Victor DeZen (a principal in a Canadian Enterprise, Royal Plastics Group) who is not active in the management of Respondent. In any event, when Respondent first hired Penman, he was required to sign a ''key employee'' agreement (G.C. Exh. 5).[4]

Although the key agreement is designed to protect the employer (Respondent) from the employee revealing trade secrets, in fact, Vice President Laquatra testified (Tr. 47 et seq.) that a key employee ''really affects how the business will run [and] has the knowledge and the ability to keep the place going.'' Penman progressed from his original position of operator trainee to become a class A machine operator, and then a die shooter and a die tuner, the only employee in Respondent's employ having such flexibility and skills. Penman worked in most of the functional areas in the plant and knew everything going on in the plant from working with all the employees (Tr. 59).

3. For reasons unknown on this record, Supervisor Leonard Feather terminated Penman's employment in March 1986 but, on Penman's immediate appeal to President Felt, was reinstated without loss of employment status. In 1991, Penman was promoted from hourly to salaried status to work under Production Manager Jim Bentley and attended foremen's and management meetings; but on or about January 6, 1992, with the discharge of Bentley, for reasons unknown on the record, was returned to hourly status. He was given no reason for this change but Supervisor Leonard Feather told him that he would keep both the increased vacation allowance and the pay raise he had received in salaried status (Tr. 176–178). In fact, Penman preferred the hourly rate because he was paid for overtime (Tr. 178).[5]

[3] It stipulated that in or about the period of September and October 1992, the relevant period, Respondent employed a total of about 85 employees in its clerical, shipping, packing, warehouse, quality control production, and machine shop, of whom 65 were in the production and maintenance unit. According to Vice President Laquatra, the tool department (machine shop) had about 10 to 15 employees under Tool Department Manager Brad Mourant; and the production department, under Dan Porembka, had about 24 to 25 employees. Respondent worked 3 shifts in the fall of 1992: 24 to 25 employees on the 8–4 p.m. shift; 10 employees on the 4 p.m. to midnight shift; and 10 employees on the midnight to 8 a.m. shift.

[4] Although Laquatra testified that other employees signed ''key'' agreements along with Penman, particularly Doug Matto, in 1985, and although Respondent offered to produce the agreement, it did not do so. I find that only Penman signed such an agreement. Key employees are always paid more than other employees (Tr. 50).

[5] Respondent argues (Br. 6) and apparently attempted to prove that this clearly irrelevant January 1992 change from salary to hourly status involved a demotion or at least an adverse action. The supervisor who actually notified Penman of the change was Leonard Feather. I forbade Laquatra to testify concerning the reasons for the change in status since Supervisor Feather had the actual conversation with

Continued

4. *Penman's July 7, 1992 Annual Evaluation*: Respondent annually evaluates each of its employees. The most recent and only record evaluation for Robert Penman is dated July 7, 1992, approximately 3 months before his October 14, 1992 discharge. The purposes of the evaluation (G.C. Exh. 7) appearing on its face, are (a) to provide objective criteria for personnel performance evaluations on a standard basis; (b) to compel examination of *all* (emphasis in the original) individual traits affecting employee performance; (c) to help the evaluating supervisor to support his conclusion and recommendation for job classification and compensation improvements; and (d) to produce fairer evaluations.

The form supplied for each evaluation contains 13 categories, each of which is to be graded on a scale of 0–4; the ''0'' rating is defined as unsatisfactory with a ''4'' rating being the highest.

The July 1992 Penman annual evaluation was made by Production Manager Daniel J. Porembka and approved by Vice President Laquatra. Penman signed the evaluation, approving its contents, on July 14, 1992.[6]

The 13 categories supporting the evaluation are *knowledge, quantity* [of production], *accuracy, judgment, innovation, appearance and habits, orderliness, courtesy, cooperation, initiative, reliability, perseverance, stability, attendance, and alertness*. In these 13 categories, Porembka rated Penman in the highest category (''4'') in 5 categories. These 5 outstanding categories were for accuracy, judgment, exceptionally precise organization (''orderliness''), cooperation, and alertness. In seven of the eight remaining categories, Porembka rated Penman as ''3'' (innovation, appearance and habits, courtesy, initiative, reliability, perseverance, and stability). The only grade lower than 3 is in *attendance*. The ''2'' in attendance carries the conclusion that Penman displayed a ''satisfactory attendance record.'' The sum total evaluation rated Penman as ''49,'' which, as Respondent conceded, was a very high grade.[7]

On the day after Porembka executed the July 7, 1992 evaluation, he appended his further two-page analysis and critique of Penman's attitude and performance, supplying the details of Porembka's portrait of a gifted, loyal, devoted, cooperative, and innovative employee (G.C. Exh. 7).[8]

Penman describing the reasons for the change. I insisted that Feather testify as to his conversation with Penman concerning the Penman change of status to hourly wages (Tr. 479–480). Feather, still in the employ of Respondent at the time of the hearing, was never produced. I would find that the status change was not a demotion or adverse action if the finding were necessary. Rather, in the change of status, Penman retained increased net pay and vacation benefits he enjoyed in salaried status, as Penman testified.

[6] There is no dispute that at the time of the October 14, 1992 discharge, Penman was under the supervision of Machine Shop (Tool Room) Manager Brad Mourant. Mourant controlled his pay, attendance records, his days off, and was ''strictly responsible'' for his work (Tr. 274). Mourant testified that Penman was more under his supervision and Mourant was responsible for Penman's actions (Tr. 274). At the same time, however, Production Manager Porembka testified (Tr. 586) that it was he who evaluated Penman notwithstanding that Mourant was Penman's supervisor. He did so, according to Porembka, contrary to Mourant's testimony, because, although Penman spent some of his time in Mourant's die shop, most of Penman's time was spent with Porembka, shooting dies (Tr. 586). Since Mourant estimated that Penman spent 98 percent of his working day with *him* (Tr. 274–275), it is difficult to understand how Porembka testified that ''most of the time,'' Penman worked with *him* (Tr. 586). Mourant testified that 2 weeks before Penman's July 1992 annual evaluation, he met informally with Porembka regarding the evaluation. He allegedly told Porembka that although Penman was highly skilled, he ''couldn't rely on [Penman].'' Porembka allegedly made no comment (Tr. 277). When it was pointed out to Mourant that in the annual evaluation, Porembka rated Penman's ''reliability'' as a ''3,'' Mourant testified that he had told Porembka only that he had ''concerns'' for Penman's reliablity. On the basis of the evaluation, Mourant admitted that Porembka did not take Mourant's opinion seriously (Tr. 277). Moreover, while Mourant testified that he did not define or debate what he meant by ''concerns'' with Penman's ''reliability'' when he spoke to Porembka, Porembka testified that Mourant did not mention any attendance or absentee problems (Tr. 587).

[7] I rejected Respondent's attempt to place in evidence (R. Exhs. 9–15, rejected), the annual evaluations of other employees with equal or higher scores than Penman. These documents, I ruled, were irrelevant because Respondent failed to offer to prove that any of them had been terminated by Respondent. In addition Respondent did not offer to prove that Penman's ''49'' was meaningless because the grading system was meaningless—that all employees received high grades.

[8] 7/8/92

Bob Penman:

Bob without a doubt has played a key roll in establishing the melt conditions and stability in processing we have achieved to date. He very willingly shared his experience and knowledge with myself and very quickly applied the concepts of plastic or melt technology to the application. On occasion Bob has assisted in training sessions with different shifts. Bob communicates well and interacts well with management and engineering as well as operators on the floor.

He possesses the uncanny ability to diagnose a problem in a profile, be it calibration, melt flow etc. and through a team effort assist in providing solutions. Many times when an operator or die shooter has difficulty getting a part or feeding a calibrator Bob is elected the task to ascertain the problem and correct [it]. His organizational skills and documentation of facts are excellent and vital to the success of the program, providing the proper input back to engineering. He requires very little supervision if any in performance of his tasks. Once given proper direction to take [he] acts well on his own. His judgment calls regarding die tuning coincide well with engineering and has accepted readily the concepts given him from the design engineer. Basically Keith and myself trust his work and ability. I recommend for training purposes in the future any new hirees be assigned to Bob where this can be and learn all the key aspects of propile extrusion. Bob very clearly exhibits in his actions that he has the Company's best interest in mind through his daily effort. *The only thing causing Bob to be a borderline outstanding employee is his exposure and experience in the machine shop. But also here Bob is making great progress, as his time and exposure increases* [emphasis added]. The operators and supervisors hold Bob in high regard. He could with very little difficulty fill in if needed in a supervisory capacity. Neither a die tuner from the machine shop or supervisor from the floor could perform his daily tasks. Bob in his position provides the much needed link that ties design, engineering, machine shop and production together. Bob has much greater potential and expects his contributions to the organization in the future to be many. In light of his performance I feel he should be rewarded with an annual increase of 13 percent. An investment well taken.

Daniel J. Porembka Current $11.50—[recommended] $13.00.

Penman received the increase to $13 per hour.

C. *The Union Organizational Campaign August–October 1992*

In the summers of 1990 and 1991, the Union distributed leaflets at Respondent's plant for a couple of weeks. In August 1992, the Union again distributed leaflets at the entrance to Respondent's plant, once a week during the month. On one such occasion, Penman spoke to the union representatives and was wearing a T-shirt bearing the union label. Following the leaflet distributions, Penman attended union organizational meetings and thereafter allowed the Union to hold organizational meetings at his residence on four occasions: from in or about mid-September to early October 1992. In August 1992, when Penman spoke to a union representative at the plant entrance, he took literature and punched in at about 8 a.m. Vice President Laquatra asked him who was outside and what they were doing. Penman said that they were union organizers. Laquatra wanted to know what the Union was saying and what the literature said. Penman gave Laquatra the literature.

D. *Violations of Section 8(a)(1) in September 1992*

(1) Respondent held meetings of its employees and supervisors in its conference room on September 8, 9, and 10, 1992, and in October 1992, which meetings were sometimes conducted by Supervisor Heather Werner and office clerical employee Kelly Hammer (Tr. 560). At those meetings, Hammer and Werner were accompanied by other supervisors including Robert W. White, a salaried supervisor at that time (soon to become, October 2, the assistant production manager). On other occasions, Production Manager Daniel Porembka attended.

At the meetings, Hammer and Werner reviewed Respondent's employee handbook policies on pay raises, insurance, the bonus and pension programs for almost an hour before the particular employees' shift. The meetings were attended by 7–10 employees on each occasion. Werner and Hammer spoke not only of Respondent's employee benefits but negotiations with the Union and strikes. They told the employees that they could lose benefits if the Union got in but that it was a give-and-take proposition. They made no promises or uttered no threats to the employees.[9]

(2) *The testimony of Frank Blazek*: Blazek, a former employee, testified that after Kelly Hammer and Heather Werner left the room, Shift Supervisor White asked each of the assembled employees what they thought of the Union. Blazek, who stated that White knew that Blazek had formerly been employed in a union shop, answered that a union had its good points and its bad points. Although White did not ask all the employees about what they thought of the Union, he did ask most of the 7–10 employees at the meeting the same thing (Tr. 222–223). I conclude that White's systematic questioning of individual employees at a Respondent compulsory meeting concerning their union sympathies constituted coercive interrogation in violation of Section 8(a)(1) of the Act.

(3) *The testimony of Michael E. Jellison*: Jellison, like Blazek, a former employee of Respondent laid off on February 2 and recalled on March 2, 1993, refused the recall because Respondent offered only the 4 to 12 shift rather than the midnight to 8 a.m. shift.

Jellison testified about an October 1992 morning meeting of six employees in the conference room, after the end of his 12–8 a.m. shift, which was addressed by Production Manager Porembka. Porembka first spoke to them on their work problems and then, according to Jellison, ''out of the blue'' started talking about the Union (Tr. 250). Porembka told them that he had heard a lot of talk about the Union and that the employees had good benefits. He wanted to know what the employees felt about the Union and particularly whether the Union would ''get in there or if it didn't get in there'' (Tr. 250). Jellison testified clearly and credibly that although Porembka promised no benefits, he said that the employees would ''probably lose benefits if the Union would get in there . . . lose our health care . . . might lose the profit sharing'' (Tr. 250).

Porembka did not deny Jellison's testimony. Rather, Respondent defends on the grounds that since Jellison answered Porembka's questions by stating that the employees ''didn't know'' (Tr. 245) about their feelings about the Union, Porembka's question, as a matter of law, was de minimis and not a violation of the Act. In fact, however, that interrogation was joined by a threat of loss of benefits: the health care program and the profit sharing-program (Tr. 250). Where allegedly minor interrogation (Porembka, however, was conducting systematic interrogation) is joined by unlawful threats especially from a hostile high management official, the interrogation becomes coercive, violating Section 8(a)(1) of the Act. *Masland Industries*, 311 NLRB 184 fn. 2 (1993). Not only is the interrogation unlawful, but here, Porembka *threatened* the employees, if the Union got in, with loss of their profit sharing plan and their health plan. Such threats independently violate Section 8(a)(1) of the Act, as alleged. Respondent's defense—the employees' answers—is irrelevant. The violation derives from Respondent's questions and statements rather than the employees' answers.

(4) *The testimony of Allen Gardner*: Gardner recalled a conversation with Supervisor Robert White in September 1992, after White emerged from a foremen's meeting. Foremen's meetings, held regularly on Thursday of each week, were attended by the production manager. Garner testified that White, emerging from a September foremen's meeting, nodded his head back toward the offices from which he had just emerged and said that ''they want us to talk to you about the union'' (Tr. 256). White wanted to know ''where the Union stood . . . as far as the employees and the union'' (Tr. 256). When he asked Gardner ''how does the Union stand [with the employees], Gardner replied that ''all the operators were for it. Probably 50 percent of the people in the plant.'' White failed to specifically deny the Gardner testimony concerning the alleged interrogation (Tr. 570–571). To the extent that his testimony, however, constitutes a denial of this interrogation, I discredit any such denial. I find that White's questions to Gardner concerning how the Union stood with him and how it stood with the other employees, are precisely the type of information (in the presence of con-

[9] Following the testimony of General Counsel's witnesses with regard to the statements and actions of Werner and Hammer at these September 8–10, 1992 meetings, on Respondent's motion, I dismissed amended complaint pars. 7(e), 9(c), and 10(a) relating to allegations that Werner and Hammer threatened the employees with plant closing if they supported the Union; unlawfully solicited grievances; and informed employees of the futility of their selecting the Union as their bargaining representative.

temporaneous union activity) that employees are privileged to keep from their employer. *NLRB v. Laredo Coca-Cola Bottling Co*., 613 F.2d 1338 (5th Cir. 1980), cert. denied 105 LRRM 2658 (1980). This White interrogation violates Section 8(a)(1) of the Act as alleged.

Gardner, however, mentioned two other conversations with White. In the second conversation, White came out of the offices and said: ''Ernie [President Ernest Felt] said he can shut down the plant and replace everybody with employees from Chelsea [Chelsea Industries, a/k/a Poly-Tex] [Tr. 257–258]. Gardner told White that he could not see how Felt could do that (Tr. 258). No one else was present and Gardner noticed that most of the conversations he had regarding the Union with White and Assistant Foreman DiBase occurred on a one-on-one basis. I credit Gardner and find that this White threat that Felt would shut down the plant and replace the employees violates Section 8(a)(1) as alleged. *NLRB v. J. W. Mays, Inc*., 356 F.2d 693 (2d Cir. 1966).

On a third occasion, while White was assisting Gardner with one of his machines, he asked Gardner: ''why are you for the union, what do you think they can do to help you?'' Gardner answered that the Union would provide improved working conditions (Tr. 259). White responded that working conditions were negotiable and wages could be ''cut down to minimum wages, no benefits.'' (Tr. 261.) Gardner had not previously been identified as a union supporter.

Respondent defends against Gardner's testimony in the following respects: (1) that since the conversations between White and Gardner occurred on one-on-one basis, there is an alleged fatal variance between such proof and the allegations of the complaint wherein White allegedly threatened ''employees'' with plant closing. On this basis, Respondent argues that Gardner's testimony is not credible. I reject Respondent's positions: Gardner's testimony is clearly credible; White, as I observed him and compared his testimony with that of Blazek, Gardner, and Penman (infra), is not credible; and there is no fatal variance between the allegations of the complaint (in the plural) and the proof which is merely a one-on-one threat. With regard to White's denial of any such conversations (Tr. 571), he predicates the ''absurdity'' of Gardner's testimony on his assertion that in his 5 years of employment with Respondent, he had no more than two conversations with Felt and had no such conversation with Gardner (Tr. 571–572). White's ''indignation'' with respect to Gardner's testimony notwithstanding, I credit Gardner and discredit White's denial. The threat, of course, is White's threat, regardless whether Felt made any such comment. *NLRB v. J. W. Mays, Inc*., supra.

Lastly, Gardner testified that on an occasion apparently after the October 14, 1992 discharge of Penman, there was posted on the bulletin board a document requesting the presence of an employee ''willing to talk to Ernie [Felt] and Angelo [Laquatra] about the union.'' In substance, the posted notice ''wanted somebody to represent the employees to come in and talk to them'' (Tr. 262). Gardner, without identifying the person, testified that he was ''being bugged to go in and talk to them'' (Tr. 262) and finally agreed to speak to them on condition that he would get a written agreement that his job would not be terminated if he did so (Tr. 262). He spoke to Supervisor White and agreed to speak to Felt and Laquatra but they were out of town at the time (Tr. 263). Instead, White then spoke with Production Manager Porembka and told Gardner that Porembka would be willing to talk to him. Gardner at that point laughed and walked away. White, however, went into the office, and emerged with two notebooks: one for writing down notes of conversations with employees that Gardner had talked to and the other one to prepare for a conversation that he would have with Laquatra and Felt (Tr. 263). Gardner never met with Felt and Laquatra.

I discredit White's testimony that Gardner requested a notebook to record safety problems and conclude that White's conduct was an open solicitation of employee complaints, for the purpose of solving them, in the presence of concurrent union organizational attempts, thus violating Section 8(a)(1) of the Act as alleged. It is noteworthy that White's solicitation of Gardner to present employee grievances to Laquatra and Felt occurred after he unlawfully interrogated Gardner and identified him as being prounion. With regard to White's credibility, I observed that White, a facile witness, testified that although, from time to time, he had conversations with employees concerning the Union, he did so *only* when the employees would first bring up the subject (Tr. 568–569). A moment before such testimony, he testified that none of the employees would talk to him about the Union because they knew that he took a management position (Tr. 556–557). If the employees feared and avoided speaking to him about the Union because they knew he represented management, it is difficult to understand why employees, as he testified, would approach *him* and bring up the subject of the Union.

Furthermore, there is the question of matching White's credibility with that of employee Jeffrey Nordquist.

(5) *The testimony of Jeffrey Nordquist*: At the time of his giving testimony, Nordquist, employed by Respondent since May 1991, was a current employee of Respondent, an extrusion operator (Tr. 230). In the fall of 1992, his supervisor was Tony Leppo along with Assistant Supervisor Gomer Ralph. He testified concerning conversations with both Supervisors White and Leppo at different occasions. With respect to conversations with White, he testified that sometime in October 1992, on the production floor, at the start of his 4 p.m. to midngiht shift, in the presence of Supervisor Leppo, ''Mr. White just asked me what I thought of the union?'' and Nordquist responded that he did not really care one way or the other (Tr. 238). About a week thereafter, in the same production area, at about the same time, Leppo asked him: ''So what do you think of the Union? and Nordquist responded that he didn't care one way or the other'' (Tr. 239). Such repeated interrogation is coercive.

Aside from Nordquist's testimony demonstrating Respondent's systematized, unlawful interrogation by its supervisors, for purposes of determining White's credibility as a witness, rejecting his various denials of having interrogated and threatened employees, there are two facets of Nordquist's testimony that bear observation. In the first place, there was no question that Nordquist, a current employee of Respondent at the time of giving his testimony, was testifying in the presence of Vice President Laquatra among other supervisors in the hearing room. He appeared to be so frightened in giving his testimony that, to my observation, he feigned inability to read the Board agent's handwriting in his sworn statement (Tr. 234 et seq.). Nordquist, a large, well built fellow, testified in such low tones that, on the record, I urged him

to stop whispering and to speak up (Tr. 237). As a current employee, he is to receive relatively high marks for credibility while testifying against his employer, under his supervisor's gaze. *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961).

Lastly, and most important, it was clear from his testimony that in his conversation with Supervisor White, he did not raise the question of the Union with White; rather, as Nordquist testified: ''Mr. White just asked me what I thought of the Union'' (Tr. 238). It is equally clear that White (and Supervisor Leppo) were systematically interrogating employees, including Nordquist. For credibility purposes, contrary to White's testimony, it was White who raised the question of Nordquist's union sympathies rather than Nordquist gratuitously raising the question to White. Former employee Gardner testified to the same effect concerning White in a September interrogation. On this ground, in particular, I discredit White's self-assured testimony in its entirety. I conclude that Supervisors Leppo and White, in October 1992 unlawfully interrogated Nordquist concerning his union sympathies, just as White had earlier interrogated Blazek and Gardner in violation of Section 8(a)(1) of the Act.

E. *The October 14, 1992 Discharge of Robert Penman*

Former employee Frank Blazek's credited testimony was that, in a September 1992 meeting, where Respondent presented its antiunion position, Supervisor White asked the employees what they thought of the Union. Similarly, former employee Gardner's credited testimony was that also in September 1992, after one of the foremen's meetings, in the morning, Supervisor White told him, while nodding his head toward Respondent's offices, that ''they'' wanted White to talk to the employees about the Union. Particularly, ''they . . . wanted to know where the union stood . . . as far as the employees in the union'' (Tr. 256).

Similarly, Penman testified that, in September 1992, in the morning, Supervisor White emerged from a foremen's meeting (at which were present all production foremen) and approached Penman at the water cooler. Penman asked White (Tr. 103 et. seq.): ''Did they [at the Foremen's Meeting] tell you anything good?'' White responded that Penman should ''just watch [yourself]; that [your] name came up several times at the meeting; that [I] did not want you to repeat that to any one [because I] did not want it to get back to inside [Tr. 103]; and . . . he didn't want no one to know'' (Tr. 107). White denied this conversation (Tr. 549–550, 554). I do not credit White's denial or any of his contradicted testimony for the reasons above stated. Moreover, I conclude that White's warning to Penman, notwithstanding its otherwise ambiguous nature, was a warning against Penman's continued participation in union activities. Since this warning was not alleged as a violation of Section 8(a)(1) of the Act, I need not pass on statutory effects of the warning.

In the months of September and October, the uncontradicted testimony was that Penman held four union meetings in his house. Although there is no proof that Respondent had knowledge of Penman's participating in these union meetings, Supervisor White admitted that he knew of a rumor that Penman, contrary to any alleged prior antiunion position, was for the Union in the period August through October 1992 (Tr. 556–557).

After White's warning, above, Production Manager Porembka[10] and Machine Shop Manager Mourant together presented Penman with a written ''verbal warning'' for being late *three times* in *3 weeks* (G.C. Exh. 8).[11]

1. Late September; Respondent offers Penman the position of assistant production manager

Either on Friday, September 25 or Monday, September 28, 1992, 2 weeks before the discharge, Respondent's president, Ernest Felt, offered Penman the position of assistant production manager in Respondent's plant.[12] Penman told Felt that he needed some time to think about the offer (Tr. 94).

On Friday, October 2, 1992, Penman told Felt that he did not feel that he was ready for the new position. Felt told him that if that was his decision, that was his decision (Tr. 95). A short time later, still on Friday, October 2, 1992, Penman telephoned Vice President Laquatra and asked him whether, if Penman took the job, and did not care for it, he could return to his old hourly position. Laquatra told him that he could not return to his old position but that, in any event, it was too late because the position had been filled. There is no dispute that in the 2-hour period between Penman's speaking to Felt in Felt's office and his later telephone call to Laquatra, the job was offered to and accepted by Shift Supervisor Robert White.

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[10] In September, Penman, arguing with Porembka on the plant floor, told him that a union would offer job security and make the plant a better place to work. Porembka answered that it didn't matter whether there was a union; that employees could lose their jobs at any time; and that a union would not save Penman's job (Tr. 114). I do not credit any Porembka denial of this conversation.

[11] The verbal warning, signed by Penman on September 11, 1992, is itself dated September 11, 1992. In a later written warning of October 13, 1992, the original September 11, 1992 warning was alleged to be for being late 3 days in *1 week*. (G.C. Exh. 12.) There was no explanation for this discrepancy. Penman testified that no one told him what days he was late or in which time periods he was late (Tr. 109) and that he did not know whether he was late three times in the prior 3 weeks. He testified that he punched in on his timecard each day (Tr. 109–110). Respondent failed to produce Penman's timecards to show such latenesses. The only document actually submitted by Respondent to show Penman's latenesses appears to show that in the week ending September 13, 1992, Penman was late on only *one* occasion (G.C. Exh. 6). Again, Respondent submitted no timecards to support this assertion notwithstanding, as Respondent's office clerical, Kelly Hammer testified, the document submitted by Respondent to show latenesses (G.C. Exh. 6) was prepared by her from Penman's timecards.

[12] President Felt, who did not testify or appear at the hearing, first consulted Production Manager Daniel Porembka prior to offering Penman the job. Porembka said that he told Felt that although Penman had the ''tools'' for the job, he recommended against appointing Penman and highly recommended Supervisor Robert White (Tr. 603–604). White testified that Penman, though hourly paid, was higher paid than White, a salaried supervisor. While Porembka warned Felt that the position required more effort than from an average employee (Tr. 603), and that he didn't feel that Penman was willing to put that kind of time in, Felt, overruling both Porembka's objection to Penman and his recommendation of White, told Porembka that he would trust his own judgment (Tr. 603) and appoint Penman. Porembka admitted that he did not mention Penman's alleged chronic lateness to Felt (Tr. 603) because Felt himself told Porembka that he *knew* that Penman was a chronically tardy employee (Tr. 604).

2. October 7, 1992; Laquatra's unlawful conversation with Penman

In early October 1992 (Tr. 110), around the time that President Felt offered Penman the position of assistant production manager, Vice President Angelo Laquatra asked Penman, on the plant floor, if he could talk to Penman ''off the record'' (Tr. 110). Penman asked him what he wanted to talk about and Laquatra said it was about the Union. Penman agreed to talk (Tr. 110).[13]

I find, however, that it occurred on Wednesday, October 7 or Thursday, October 8. Penman testified that Laquatra asked to speak to him ''off the record'' and Laquatra admitted that he asked Penman to speak ''privately'' (Tr. 484). Thereafter, Laquatra testified merely that he ''met [Penman] outside and had a further conversation with him'' (Tr. 485). I credit Penman's version that Laquatra asked him to ''go somewhere where nobody is going to see us talk'' and that Penman agreed to Laquatra's suggestion that they meet outside the building in the parking area for office personnel (Tr. 110).

Laquatra asked Penman ''how the Union was doing'' and Penman answered that it was ''going the same as it has been'' (Tr. 111). Laquatra then asked Penman what the employees were so upset about and why they wanted a union (Tr. 485), and what Respondent was ''doing right and what Respondent was doing wrong'' (Tr. 485). Penman said that he was not sure because no one even had approached him to sign a union card (Tr. 485). Laquatra then asked why Penman himself wanted the Union because, if the Union got in, he would be taking a pay cut; that Penman would lose money and that wages would start from a $9-per-hour base (Tr. 111–112). Laquatra suggested that Penman gather employees for a meeting with management, perhaps at the home of President Felt. Apparently after Penman then told Laquatra that he would talk to the employees about the meeting with management, Laquatra told him that President Felt was out of town at the time; that they were waiting for (majority stockholder) Vic DeZen to come down from Canada; that DeZen[14] knew nothing of the union activity going on in Respondent (Tr. 112); and that Respondent's management and shareholders, Angelo Laquatra and Leonard Feather, including President Felt who wanted to retire, were afraid what Victor DeZen might do if he learned of the union activity at the plant (Tr. 112–113). When Penman asked him what he meant by what DeZen ''might do,'' Laquatra answered that ''they were scared that he might shut the plant down'' (Tr. 113).[15]

When Penman agreed to speak to the employees and after Laquatra suggested that they might meet at President Felt's house, Laquatra said that he would let Penman know of the date and time for the meeting and wanted to know how many employees he could get for the meeting (Tr. 113).

While I find that he asserted that negotiations start from ground zero and could go up and down, I do not credit his denial that he told Penman that Penman would lose money if the Union came in (Tr. 510). I do not credit, moreover, any of his contradicted testimony. I was particularly impressed with the progression of Laquatra's equivocal testimony whether he, in the first place, mentioned the Union to Penman (Tr. 483). His first version (Tr. 483) was that he was not sure if he or Penman had brought up the subject of the Union in this private conversation. He finally settled on the position that he ''probably'' brought up the subject of the Union and that he ''probably'' asked Penman why the employees were so ''upset'' (Tr. 485).[16] Notwithstanding Laquatra's testimony that he chose to speak privately to Penman because Penman was his ''friend'' and a long-time employee who knew a lot of what was going on in the plant, I also conclude that, by this time, whether in late September or in early October, especially in view of Respondent's knowledge (White) of the ''rumor'' concerning Penman's current prounion stance, Laquatra chose Penman because he knew that Penman was a supporter of the Union. He explicitly warned Penman, in this same conversation, of a diminished wage rate if the Union came in and expressed puzzlement why Penman nevertheless supported the Union. I make this finding of Respondent's knowledge of Penman's union sympathies independent of White's previous warning that Penman ''watch himself'' because his name was being repeatedly mentioned in the contemporaneous foremen's meeting.

The complaint alleges that this conversation contains various violations of Section 8(a)(1) of the Act. I conclude, in the first place, that when Laquatra asked Penman why he was for the Union, how the Union was doing, and why he wanted the Union in view of the pay cut that he would receive if the Union got in, such questions amounted to unlawful interrogation in violation of Section 8(a)(1) of the Act. Questioning by a top supervisor, hostile to union activities, designed to have an employee divulge the extent of his or coemployees' union activities or sympathies constitutes unlawful, coercive interrogation, for it is precisely the type of information which employees, under the Act, are privileged and permitted to keep to themselves, *NLRB v. Laredo Coca-Cola Bottling Co*., 613 F.2d 1338 (5th Cir. 1980), cert. denied 105 LRRM 2658 (1980); *Masland Industries*, 311 NLRB 184 fn. 2 (1993). Respondent's citation of *Ernest Home Centers*, 308 NLRB 848 (1992), to support the proposition that such discussions took place between ''friends'' (R. Br. 42) and did not violate Section 8(a)(1) of the Act, is misplaced. In that case, the Board, affirming the administrative law judge, found no unlawful interrogation, notwithstanding that the conversation occurred between friends in the supervisor's office, because (1) the employee commonly engaged in conversations in his supervisor's office; because (2) it was the employee, rather than the supervisor, who raised the question of the circulation of a decertification petition; and because (3) the supervisor asked only a single question concerning what was happening to the decertification petition. In the instant case, Laquatra invited Penman to speak ''off the record'' outside the office so that they could not be seen; it was Laquatra who raised the question of Penman's union activities; and it was Laquatra who urged both the desirability of a meeting to blunt union organization and threatened a po-

[13] Laquatra admitted the substance of the conversation with Penman and recalled that it occurred on a Thursday in late September, a payday, at the water fountain (Tr. 482).

[14] Victor DeZen, majority shareholder in Respondent, is associated with Royal Plastics of Canada (G.C. Exh. 25).

[15] See the similar testimony of former employee Gardner, supra.

[16] In his sworn pretrial statement (G.C. Exh. 26), Laquatra says that he wanted to know what made the employees ''mad.''

tential shutdown of the plant if the majority shareholder got wind of union activity in the plant and also a loss of wages to Penman. See *Masland Industries*, supra at fn. 2.

Penman's uncontradicted testimony (Tr. 112–113), as above noted, was that Laquatra told him that if Vic DeZen discovered the union activity in Respondent's plant, he would shut the plant down. I credit it. Respondent nevertheless defends against this finding on the ground that all Penman's testimony was totally incredible and since there was no corroboration it should be given no weight. I find, on the contrary, that Laquatra was present throughout the hearing and should have denied Penman's testimony. No corroboration, under those facts was possible or necessary. Although Penman's own veracity was hardly unblemished,[17] I credit Penman in this regard. Such a result flows from my observation of the witnesses, a review of the entire record, and an analysis of the veracity of all witnesses. I find that Laquatra's threat, like White's threat to Gardner, that DeZen would close the plant (White said Felt would shut it down) if he discovered union activity in the plant violated Section 8(a)(1) of the Act as alleged as did the interrogation.

Lastly, I find that Laquatra's October 7, 1992 ''off the record'' conversation with Penman included an unlawful solicitation of employee complaints and grievances which an implicit promise to rectify them. Laquatra asked Penman to set up a meeting of employees to determine what made the employees sufficiently angry or upset to cause them to support the Union and requested that Penman gather the employees at President Felt's house to see what Respondent was ''doing wrong,'' implicitly promising that the wrongs could be rectified. Such a request, in the face of concurrent union organization, is the unlawful solicitation of grievances with the implicit promise of rectifying them, all in violation of Section 8(a)(1) of the Act as alleged. *Enterprise Products Co.*, 265 NLRB 544, 549 (1982).

Respondent's general defense—that Laquatra's acts of interrogation, threats, etc. were not coercive because of ''friendship''—has again been specifically rejected by the Board in *Sage Dining Service*, 312 NLRB 845 (1993).

3. The October 8, 1992 arm injury; October 13 medical treatment; the discharge of October 14, 1992

In October 1992, as above noted, because of Penman's outstanding skills and ability to work without supervision, he had been transferred to the night shift (midnight to 8 a.m.).[18]

Thus, on the day following Laquatra's unlawful ''off the record'' parking-lot conversation with Penman, Penman reported for and worked the night shift of October 8/9. During the shift, while trying to release certain bolts on machinery, he injured his shoulder. Pursuant to Respondent's outstanding instructions he told his night-shift supervisor, Chuck Dowling, of the injury (Tr. 117), requested him to execute an accident report and make sure it went to Machine Shop Manager Brad Mourant (Tr. 201). Other than mentioning the injury to Shift Supervisor Dowling, he did not mention it later in the morning to either Porembka or Mourant in the overlapping 2-hour period, 6 to 8 a.m. (October 9) when Mourant and Porembka reported for, and were present at, work and while Penman had not yet finished his shift. It is undisputed that Mourant nevertheless saw the report of the injury on the production report that Dowling submitted to Mourant by 10:30 a.m. on the same day (October 9). It is further undisputed that Penman was following normal procedure in reporting the injury to his immediate supervisor, Chuck Dowling (Tr. 299).

On the night following his injury, the night of October 9, Penman did not report for work that Thursday/Friday night but, pursuant to Respondent's rules, telephoned to the Respondent, asked for Shift Supervisor Chuck Dowling and was told that he was not there. Penman, pursuant to authorized procedure, then told the employee who answered the phone (whose name he did not know) that Dowling was supposed to have filled out an accident report and notified Mourant.

[17] Respondent argues against Penman's crediblity on the ground that Penman testified extensively that, in his 8 years' employment he never received a copy of Respondent's employee handbook (Jt. Exh. 1). There is no question, however, that Penman's personnel file shows that although he received various respondent publications and distributions, he clearly did not receive the handbook according to Respondent's own records (G.C. Exh. 3). On the other hand, I agree with Respondent (R. Br. 24) that Penman was not credible in his denial of knowledge of the existence of the employee handbook in the 8 years of his employment. I further agree that it is highly unlikely that Penman was unaware of Respondent's formal antipathy to absenteeism and a policy against it. While there is no evidence, and I do not find, that he knew of any ''no-fault'' absentee rule requiring termination on the 12th day of unexcused absences in any 12-month period, there is no question in my mind that Penman, contrary to the tenor of his testimony, understood that Respondent frowned on excessive absenses. To the extent that Laquatra, for instance, testified that the absentee policy in the handbook was discussed in detail with Penman at the time of Penman's termination on October 14, such testimony, though denied, may be true but it does not suggest that Penman knew about the rule before the discharge. His knowledge on or after October 14 is irrelevant. Lastly, I agree that Penman's testimony, apparently denying his signature on Respondent's December 30, 1985 oral warning for being 15 minutes late, is not credible. I further agree, that this incrediblity is based not on Penman's failure to suggest that he did not remember the existence of that warning but that the signature appearing on it, although it looked like his signature, was not actually his. Like Respondent, I do not accept his testimony that he did not know whether the signature was his (Tr. 158). Lastly, I was not impressed with Penman's testimony concerning the circumstances under which he came into possession of certain original respondent records which Respondent had not surrendered pursuant to General Counsel's subpoena. While there is no evidence that Penman himself stole the documents, I do not credit his evasive and unconvincing testimony concerning his lack of knowledge how the documents turned up in his mailbox.

While I am fully aware of the legal apothegm that bad men tell the truth and good men lie (who are the bad men?), the problem in this case, as in other discharge cases, is evaluation of who is credible in establishing or rebutting the existence of an inference of unlawful motive in the discharge. In evaluating all the testimony, and particularly on my observation of Penman and Supervisors Laquatra, Mourant, Porembka, and White, I have come to the conclusion that, in the pertinent parts of Penman's testimony, he is credible and that in pertinent parts, Respondent's witnesses were not credible. The reasons, apart from observation of demeanor, appear in detail in the text hereafter.

[18] Although employees on the night shift, like Penman, actually punch in a few minutes *before* midnight, and although the actual working hours occur between midnight and 8 a.m. of the next day, Respondent records the work, for payroll purposes, as of the preceding night when the employee punches in. Thus, Penman punched in a few minutes before midnight on October 8 and worked from midnight to 8 a.m. on October 9, but is recorded, for payroll purposes, as having worked on October 8.

He told the employee that he was in pain, trying to get a doctor (Tr. 124). He did not see a doctor on Friday, October 9. He also did not attempt to visit the emergency room because of his desire to be treated by an orthopedist (Tr. 171).[19] Thus, Penman's October 9 telephone call to the employee, that he would not work that night because of the injury (''called off'' from work) was his only communication to Respondent. Penman had no conversation with any other employee or management representative on October 9.[20]

On Monday, October 12, Penman twice telephoned to Mourant. In a morning conversation he told Mourant (Tr. 125 et seq.) that he was trying to get in touch with a doctor who would give him an early appointment; was taking pain medications (Darvoset) (Tr. 126; G.C. Exh. 15); and asked if he could come to work notwithstanding taking the pain medication. Mourant, first blaming Penman himself for causing the injury because of his failure to properly loosen the bolts, told him that he could not come to work while taking Darvoset because of the possibility of Respondent's ''liability'' (G.C. Exh. 15). There is no dispute that Mourant said nothing to Penman, at this or any other time, that questioned the bona fides of the injury.

Penman then telephoned Kelly Hammer, Respondent's office clerical, for the name of a specialist. She gave the name of orthopedist, Jay Peterson, M.D., a member of a physicians' group practicing in nearby Carnegie, Pennsylvania. Dr. Peterson's name and phone number, along with the names of other specialists (other than orthopedists) in the medical group, was posted on Respondent's production floor at the time of the injury (apparently since June 1992). Penman was unaware of the list. He then telephoned Peterson's office and received an appointment for the afternoon of the next day, Tuesday, October 13.

After receiving the appointment with Peterson, Penman, at about 4 p.m. on October 12, again telephoned Supervisor Brad Mourant. In this 4 p.m. conversation (Tr. 127; G.C. Exh. 15), Penman told Mourant of his appointment with Peterson for the next day (October 13) and told him that he would not be in to work that night (the night of Monday/Tuesday, October 12/13) because he was still on medication, his arm was bothering him, and that he wanted to wait and see what the doctor had to say on the next day concerning the extent of the injury. Mourant told him to keep Mourant advised of what the doctor found (Tr. 127).[21] Penman did not make a further telephone call to notify Respondent that he would not work that Monday/Tuesday shift (October 12/13), i.e., he did not further ''call off work'' on Monday night (Tr. 127), because he believed that his conversation with Mourant at 4 p.m., in which he told him that he would ''probably'' not work that night, was sufficient notification to Respondent (Tr. 127).

In any event, in the afternoon of the next day October 13, he visited Peterson who, after a physical examination (Jt. Exh. 9), told him that he would prescribe pain medication and would put him on light duty (Tr. 127–128). Penman told Dr. Peterson to contact Respondent because light duty work was not available for everyone in the plant and only certain departments had light duty (Tr. 128). Peterson requested the name and telephone number of Penman's supervisor, apparently tried to reach Mourant, but then told Penman (who remained in Peterson's office) that he had telephoned Respondent and no one had returned the call (Tr. 128–129). He told Penman that he was going to permit him to work light duty and give him a slip relating to such permission (Tr. 129). He gave him the slip for light duty work (G.C. Exh. 9). The slip shows that Penman was released for light work commencing October 14 (Tr. 130).

Following his October 13 afternoon visit to the physician, at about 11 p.m., he telephoned Assistant Production Foreman Gomer Ralph (conceded to be a Respondent supervisor and agent) (Tr. 132) and told Ralph that he had a release to return to work on October 14. Ralph told him that Respondent had light duty work set up for him. Penman told Ralph that his release to return to work was for October 14 and that he would be ready to perform light duty work on the following night (October 14/15). Supervisor Ralph told Penman that he would ''let them know'' that Penman would be to work on the night of October 14/15 (Tr. 133).[22]

As he had informed Ralph, Penman reported for work on the next night, Wednesday/Thursday (October 14/15) and punched in. He there met a machinist, Robert Keeler, who told him that the light duty work was available for him (Tr. 135), but added: ''Hey, something is going on, Brad and everybody is in the office . . . Angelo [Laquatra], Lenny [Feather].'' At that point, Supervisor Brad Mourant emerged from the office and told him to come into the office. Present in the office were Vice President Laquatra, Production Manager Porembka, Mourant, and Supervisor Feather. As Penman walked into the office, Mourant handed him a bunch of papers including the printout of his absences and latenesses which, as will be discussed hereafter, Kelly Hammer created

[19] Respondent's records (Jt. Exh. 7) show that for a 2-month period (April 14–June 9, 1991) Penman was paid full salary while not working because of a medical problem. More important, the evidence shows (Jt. Exh. 9) that 2 months before this October injury, in or about August 1992, Penman had an upper back injury and was treated by a physician who performed a bone scan and prescribed a pain medication (Darvoset) (Tr. 126; Jt. Exh. 9). At that time, Penman missed 1 week of work and thereafter had a week of light work before returning to his regular job in Respondent's plant (Jt. Exh. 9).

[20] As will be seen in the text hereafter, I discredit all of Supervisor Mourant's testimony, where controverted in this hearing, and particularly his testimony that Penman telephoned him on October 9.

[21] I discredit any Mourant contrary testimony (Tr. 300 et seq.). Thus, there was no conversation between Penman and Mourant on October 9; Penman never told Mourant (he told an employee) on October 9 that he would not work that evening; and the first conversation between Penman and Mourant, as noted in the text, occurred on October 12 in the morning. Lastly, I discredit Mourant's testimony that he did not speak to Penman on October 12 (Tr. 301); that Penman's failure to work on both October 9/10 and October 12/13 came as a surprise to him; that Penman did not tell him on October 12 that he would not be in that night because of pain in the shoulder and because of the doctor's appointment the next day. I have referred to G.C. Exh. 15, allegedly Mourant's contemporaneous notes allegedly recorded 2 hours after an alleged single conversation with Penman, only for the purpose of admissions against Respondent's interest. Further reference to this spurious document will appear hereafter.

[22] Respondent did not produce Supervisor Ralph to contradict this Penman testimony notwithstanding that Ralph is still in the employ of Respondent. I credit Penman's testimony regarding this telephone call.

at Mourant's or Laquatra's direction on October 13/14;[23] a warning notice (G.C. Exh. 10) showing that he had been absent on Friday, October 9, without excuse; a second ''written'' warning, because of Penman's failure to report to work on October 12, 1992 (G.C. Exh. 11); a third written ''final'' warning dated October 12, 1992, because of absences from work[24] on October 12, 1992 (G.C. Exh. 12); and an October 14, 1992 termination notice (G.C. Exh. 13) which cites ''termination effective immediately,'' repeating the existence of the September 11 oral warning for 3 days' lateness in 1 week; the failure to report his absence from work on October 12, 1992, and the third warning of October 13, 1992, for being absent on October 12, 1992. Penman told Mourant that he was protesting the papers because of the discrepancy between the alleged 3 days' lateness in 3 weeks and 3 days' lateness in 1 week (Tr. 137) and because he was being given two written warnings for his activities on October 12; failure to report and being absent (Tr. 138). In fact, however, Penman repeated that he had formally ''called off'' from work both on October 9 and 13 (for work on October 13/14) in his conversations with an employee on October 9 and with Supervisor Gomer Ralph on October 13 (Tr. 138–139). In addition, he had spoken to Mourant himself on the afternoon of Monday, October 12, advising him that he would not be in that night (October 12/13; G.C. Exh. 15). In addition, Penman told the assembled group of supervisors that the disciplinary documents they gave him were for the days that he was hurt (Tr. 139). They responded that he had been absent on even more days than appeared on the documents which they handed him (Tr. 139).

There is no dispute that although the warning of October 12 (G.C. Exh. 10) for unexcused October 9 absence was handed to him at the time of the October 14 discharge, there was no such warning given to Penman on Monday, October 12 or Tuesday, October 13. Similarly, there is no dispute that the ''final'' written warning (G.C. Exh. 11) dated October 13, 1992, which was handed to Penman by Mourant at the midnight October 14/15 discharge, was untimely served on Penman because it did not give him the timely prior notice of alleged misconduct which is required in Respondent's employee handbook (Jt. Exh. 1, p. 6). In short, under Respondent's ''no-fault'' handbook rules he should have received his first written warning no later than on the 10th day of absence from employment; and his *final* written reprimand no later than on the 11th day of unexcused absence from employment. There is no dispute that he received neither on a timely basis.[25] On the contrary, they were all grouped in one bunch of papers given to him simultaneously with his discharge on October 14/15.

In addition, as will be noted hereafter in greater detail, Respondent's position at the hearing was that under Respondent's employee handbook (Jt. Exh. 1), Respondent's ''no-fault'' absence policy *automatically* required the termination of any employee absent 12 or more days in any 12-month period. Not only do Respondent's supervisors have discretion in recording absences as ''excused'' or ''unexcused,'' but, as General Counsel's brief observes (App. A; see Jt. Exhs. 6 and 7; and G.C. Exh. 19), even the most superficial analysis of Penman's absentee record demonstrates, in the period 1990 through 1992, that, for instance, in the period April 13, 1990, through April 5, 1991, less than a 12-month period, Penman was absent without excuse 13 times. In the period March 19, 1991, through February 27, 1992, Penman was absent 13 times. In the period April 5, 1991, through August 13, 1992, a period of only 10 months, Penman was absent 13 times. In none of these periods did Respondent serve on Penman, pursuant to its absentee rules or otherwise, any oral or written notice for excessive absences or give him any warnings regarding any absences whatsoever, much less threaten to discharge him. All the warnings and all this activity regarding latenesses and absences leading to the discharge follow union activity in the plant and Penman's identification therewith.

4. Discussion and conclusions: General Counsel's prima facie case

To prove a prima facie case of unlawful discharge, General Counsel must first demonstrate that a motivating factor in Respondent's decision to terminate Penman on October 14, 1992, was his union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393, 400–401 (1983). Respondent, in defending against such a prima facie case, must either then rebut the prima facie case by showing that the facts, as demonstrated by the General Counsel, never happened; and in this regard, Respondent must bear the burden of proof by a preponderance of the credible evidence, *Merillat Industries*, 307 NLRB 1301 (1992); or, in the alternative, again by a preponderance of the credible evidence, that Respondent would have taken the same action against Penman regardless of his protected or union activity, *NKC of America*, 291 NLRB 683 fn. 4 (1988). An ultimate inference of Respondent's unlawful motivation under *Wright Line* may be drawn from Respondent's hostility toward employees' union activities and the coincidence between such union activities and the date of the discharge. *Lemon Drop Inn v. NLRB*, 752 F.2d 323 (8th Cir. 1985); *NLRB v. Minette Mills*, 983 F.2d 1056 (4th Cir. 1993), enfg. 305 NLRB 1032 (1991). Respondent's burden to prove that, notwithstanding Penman's union activities, it would have terminated his employment regardless of such activities, effectively imposes an affirmative obligation to convince the trier of fact that the legitimate motive for the discharge existed and was sufficiently compelling, *NLRB v. Horizon Air Services*, 761 F.2d 22 (1st Cir. 1985).

General Counsel's first obligation, therefore, is to prove that Respondent had *knowledge* of Penman's union activities prior to the October 14 discharge. Assistant Production Manager White admitted (Tr. 556–557) that he knew of ''rumors'' in the plant wherein Penman was identified, in the period prior to his discharge, as being prounion. Moreover, Penman identified himself as prounion in a September argument with Porembka (Tr. 114). Furthermore, Penman's credited testimony was that in his October 7, 1992 conversation with Vice President Laquatra (1 week before the discharge),

[23] Respondent conceded that a printout for the purpose of supporting the discharge of an employee had never been created prior to the discharge of Penman.

[24] The second ''written'' warning and the third ''final'' warning are for the same alleged act.

[25] Respondent ''frankly acknowledges . . . a number of serious short comings [sic] with respect to the administration of its attendance control system.'' (R. Br. at 30.)

when Laquatra asked to speak to Penman ''off the record'' about union activities in the plant, Laquatra told Penman that he could not understand why Penman was for the Union since Penman's $13-per-hour wage rate would be subject to a starting rate of $9 if the Union came in. Such evidence is sufficient to prove Respondent's *knowledge* of Penman's union activities and sympathies prior to the discharge. In addition, I do not credit Laquatra's testimony that he chose Penman as the employee to round up other employees for a meeting with President Felt (in order to thwart employees' union support) merely because Penman knew all the employees in the plant. Rather, it was because Penman, a prounion activist, could sway other prounion employees to attend the meeting. It is not necessary, however, that the General Counsel prove that Penman was actually more active on behalf of the Union than other employees; it is enough that Respondent knew that he was in favor of the Union in order to prove the element of knowledge. See *Langston Cos*., 304 NLRB 1022 (1992). I conclude that the General Counsel has proved the element of Respondent's knowledge of Penman's prounion sympathy prior to the October 14 discharge.

A second element often required by the Board and courts, in inferring an unlawful motive is animus against employees' union activities. With regard to Respondent's animus, there is no question that its letters and postings to employees, of October 14 and 20 (Jt. Exhs. 4 and 5) were heavy medicine evincing Respondent's dislike of the Union. Respondent concedes that these documents ''admittedly contained strong statements of company opinion that the Union would be a mistake.'' (R. Br. 36.) In addition, the above unlawful acts of Respondent's systematic interrogation, threats, and warnings to employees in September and early October, all in violation of Section 8(a)(1) of the Act, are no mere technical violations. They evince an active animus against employees engaging in union activities and selecting the Union as their collective-bargaining representative. Indeed, Vice President Laquatra's and Penman's testimony of their October 7 conversation can be construed only that Laquatra desired to defeat the Union through the efforts of Penman. No further evidence is of animus is required. Manifestation of union animus, particularly the October 7 conversation came within a week of the October 14 discharge.

A third element is the question of timing of the discharge: the coincidence between the date of the discharge and Penman engaging in union activities together with Respondent's manifested animus against union activities.

In *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349 (7th Cir. 1984), the court noted that ''timing alone may suggest anti-union animus as a motivating factor.'' See *Equitable Resources Energy Co*., 307 NLRB 730 (1992). In the instant case, Supervisor White, in September 1992 warned Penman to ''watch yourself'' because Penman's name came up an ''awful'' lot at the foremen's meeting from which White emerged (Tr. 103). The credible evidence suggests that White, and other foremen, at foremen's meetings, evidently discussed the Union and that, on emerging from such meetings, White, pursuant to higher authority, unlawfully interrogated employees (credited testimony of Allen Gardner, Tr. 255–257). Thus, I have concluded that White's otherwise ambiguous warning, in the context of its timing and substance, related to Penman's union activities. In view of White's denial that any such conversation took place, and in view of my specific discrediting of White's testimony, I conclude that there is no preponderant testimony rebutting Penman's credited prima facie assertion of the existence of that warning and that the warning related to Penman's union activities. Furthermore, 1 week before the discharge, on October 7, 1992, Laquatra identified Penman as a union activist and as such, attempted to recruit him as Respondent's instrument to combat union activity by his soliciting employees to attend a meeting at which President Felt would apparently determine what Respondent was doing ''wrong'' and impliedly rectify it. In that same conversation, Laquatra engaged in unlawful interrogation concerning Penman's prounion sympathies and a warning and threat concerning Penman's loss of his $13-per-hour wage scale if the Union came in.[26]

On the basis of the above unfair labor practices contemporaneous with and immediately preceding Penman's discharge, Respondent's knowledge and particular identification of his prounion sympathy, White's ominous warning, its animus against the employees' union activities, and the timing of the discharge only a week following Vice President Laquatra's unlawful interrogation and threat to Penman because of his union sympathy, I conclude that the General Counsel, in the absence of credible rebutting testimony from Respondent's witnesses, has proved by a preponderance of the credible evidence, a prima facie case. *Wright Line*, supra; *NLRB v. Transportation Management Corp*., supra; *NLRB v. Rain-Ware, Inc*., supra, and *NKC of America*, supra at fn. 4 (1988). See also *Lemon Drop Inn v. NLRB*, supra (inference of unlawful discrimination is to be drawn where the discharge is coincidental with animus and the employee engaging in union activities).

F. *Respondent's Defense*

Repeatedly on the record and in its brief, Respondent asserts that the sole reason it terminated Penman's employment was pursuant to Respondent's absentee policy (e.g., R. Br. 28). There is no dispute that Respondent's absentee policy is contained in Respondent's employee handbook, page 5 (Jt. Exh. 1):

> 6 days absence—verbal warning
> 7 to 10 days absence—first written reprimand
> 11 days absence—final written reprimand
> 12 days absence—termination

It is also not disputed that the 12-month period in which the 12 days' absence is to be calculated is a continuing, rotating 12 consecutive month period ending with the most re-

[26] I omit from the elements of the prima facie case Respondent's offering Penman the position of assistant production manger, which offer was still outstanding as late as October 2, 1992. President Felt's offer was made with full knowledge of Penman's attendance record (according to Porembka), in the face of Production Manager Porembka's hostile, contrary recommendation. It is omitted because the offer is arguably an element rebutting Respondent's good-faith assertion of a defense rather than an element of the prima facie case. See *NLRB v. Vemco, Inc*., 989 F.2d 1468 (6th Cir. 1993). In particular, however, whether properly in the prima facie case or in rebuttal of the defense, Felt's offer, with full knowledge of, and in spite of, Penman's attendance record can reasonably establish *condonation* of Penman's past attendance inadequacy up to October 2.

cent absence (Jt. Exh. 1, p. 5; R. Br. 29). As Respondent observes (R. Br. 29, fn. 19), there was no dispute that in the period October 10, 1991, through September 25, 1992, Penman was guilty of 11 unexcused absences, at least on this record.[27]

Respondent, however would add Penman's 3 absences of October 9, 12, and 13, 1992, to reach a total of 14 absences. These, of course, are the dispositive absences. With such a record, Respondent asserts that it sustained its burden ''of establishing a lawful, independent reason for terminating Penman on October 14, 1992'' (R. Br. 29–30). Respondent thereafter asserts that the burden then shifts to the General Counsel to prove that the reason for the discharge (excessive absenteeism contrary to Respondent's existing absentee policy) was a pretext to mask unlawful motivation (R. Br. 30).

1. Respondent's concessions concerning its absentee policy and recordkeeping

Respondent concedes the following specific failures, shortcomings, omissions, and mistakes in recordkeeping and administration of its absentee policy:

(a) The daily, weekly, and monthly attendance calendars showing tardiness, lateness, and absence of employees, allegedly regularly kept by high-level, departmental supervisors, like Machine Shop Manager Mourant, were inaccurate and seldom kept in any substantial form (G.C. Exh. 4; R. Br. 30).

(b) Respondent concedes that its supervisors did not issue discipline or absentee warnings in accordance with the schedule established in its employee handbook (Jt. Exh. 1). By virtue of this concession, Respondent necessarily admits that notwithstanding that Penman had achieved his 11th day of unexcused absence on September 25, 1992, no ''final'' written reprimand was given to him *on or about that date* to timely permit him to mend his ways and thereafter to avoid a critical 12th day of unexcused absence. Rather, the untimely final written reprimand for his 11th day of absence was untimely served on him 3 weeks too late among the bunch of papers presented to him at the very moment of his discharge.

Respondent attempts to excuse this last element and its generalized failure to follow its own clearly defined program on the ground that it actually worked to the advantage of the absentees and not to their disadvantage. Such an excuse admits Respondent's failure to follow and observe its own rules. Whatever advantages it might have worked for certain other unnamed speculative discriminatees, it most certainly did not work to Penman's advantage. Not only was he *not* given the timely *final* written warning on the September 25 absence, but Respondent untimely served this crucial reprimand on Penman, together with a multitude of other papers, all betokening technical *compliance* with its rules, at the very moment that it was discharging him on October 14. This hardly worked to Penman's advantage.

(c) Similarly, Respondent concedes that no timely, or untimely, verbal warning was served on Penman on the occurrence of his sixth absence, according to the employee handbook. It should have been served on February 27, 1992.[28]

Finally, Respondent argues, contrary to the assertion of pretext, that the above failings and inconsistencies do not establish a pretext; rather, they merely are evidence that Respondent's control system was poorly designed and sufficiently inaccurate so as not to permit proper administration (R. Br. at 31). I find to the contrary: that sudden, *untimely* enforcement of an *unenforced* rule is evidence of its *pretextual* application.

2. Respondent's defense as pretext

Respondent defends on the ground that it discharged Penman on October 14, 1992, solely on the ground of his excessive absences measured against its employee handbook formula requiring termination on the 12th occurrence of unexcused absences in any 12-month period. There is no dispute, on this record, that Machine Shop Manager Bradley Mourant was the moving force in procuring the discharge. His self-assured testimony that no one else participated in the decision to terminate Penman (Tr. 305) was not credible in view of his later testimony that he ''highly recommended'' the discharge to Laquatra who gave final permission (Tr. 398). Similarly false was Laquatra's sworn pretrial statement that he did not have any role in the discharge decision itself (Tr. 505–507). His sworn testimony at the hearing was that he did participate in the decision to terminate Penman (Tr. 505). Indeed, what actually happened was that Mourant brought to Laquatra's attention the possibility of firing Penman, recommended the discharge and came to Laquatra for his decision and blessing (Tr. 508). Also false is the assertion that *automatic* discharge occurs on the 12th absence. The fallacy follows Laquatra's admissions that supervisors have ''leeway in interpreting whether to charge [an employee] with a chargeable day under no-fault'' (Tr. 439, 445–446). Thus, one employee's 12 days' absences are not necessarily the equivalent of another employee's 12 days, depending on the discretion of the supervisor (Tr. 445–446). Laquatra further early testified (Tr. 31) that Mourant did *not* ask his permission to terminate Penman but later testified (Tr. 431–432) that Mourant, stating that Penman had missed the forbidden number of days, asked him: ''What do you think.'' When Laquatra then said that Respondent ''had to be fair to everybody'' Mourant said (Tr. 431–432): ''I recommend [sic] to fire Bob Penman under the . . . no-fault absenteeism policy.''

With Mourant as the moving party in the discharge, it is necessary to recite the facts leading up to that event, the facts which spurred Mourant to bring Penman's absences to Laquatra's attention and then to make his recommendation to fire Penman.

[27] Penman testified that in 1991, while he was a salaried employee, certain of his 1991 absences were excused by then Production Manager Jim Bentley. There is no further support for such a contention and I reject it as unconvincingly general and unproven.

[28] Respondent asserts that, in any event, Penman received ''the required number of oral warnings, and written reprimands prior to his termination'' (R. Br. 31). What Respondent is arguing is that at the moment of discharge, Respondent heaped a bunch of papers, most of which were untimely under the employee handbook, on Penman in an effort to conform to some technical idea of regularity in the support of the discharge. Such an attempt failed, and Respondent's midnight, untimely attempt at technical compliance with its own rules underscores counsel's concessions that Respondent failed to observe or comply with its rules.

After confirming that he, Mourant, was the sole person recommending the termination (Tr. 305–306), he testified that he reached the *decision* to terminate him, not when Penman had exceeded the forbidden 12 days, but ''once he got close'' (Tr. 306). It was then that he decided to speak to Laquatra about terminating Penman. A review of Mourant's wholly unreliable testimony, in conjunction with Laquatra's testimony, as modified by the testimony of office clerical Kelly Hammer, shows the following chronology:

(a) After Penman telephoned Mourant in the afternoon of Monday, October 12, 1992, advising him that he would not be in that night for work, Penman was seen as coming ''close'' and Mourant decided to see if he could fire Penman on the ground of absenteeism.

On the morning of the next day, October 13 (Tr. 61–62), Mourant, charged with keeping Penman's attendance records, visited Laquatra in his office and asked Laquatra how many days Penman had been absent. Laquatra did not know and told Mourant to give the problem to office clerical Kelly Hammer who would review Penman timecards and run off a computer printout concerning the matter (Tr. 306, 377–378).

(b) *The testimony of Kelly Hammer*: Hammer is in charge of personal records and accounts payable. She is experienced in running computer printouts. At the time of giving her testimony, she was married to Respondent supervisor, Chuck Dowling.

While I do not credit her testimony that on October 12, when she gave Penman the name of Dr. Peterson, Penman told her that he was going to work that evening, I do credit her testimony that on the next afternoon, Penman telephoned to tell her that he would not be in to work that night (October 13/14) and would not return to work until the night of October 14 for light duty (Tr. 516). Not only would she ordinarily give testimony favorable to Respondent in view of her existing relationship to Supervisor Dowling, but she first gave Dr. Peterson's name to Penman on the midmorning of October 12, and he told her he would see the doctor thereafter. I regard it as unlikely that he would have told her that he was coming to work that night, before seeing the doctor.

She did recall, however, with great difficulty with regard to the actual dates or days, that on a particular day in mid-October, either Laquatra or Mourant told her that there was a question concerning Penman's attendance record (Tr. 526), and they asked her to gather Penman's timecards for the preceding 12 months to determine what his attendance record was (Tr. 527). She did recall that it was either October 12 or 13. Laquatra's credited testimony was that Mourant first approached him on the morning of October 13 concerning Penman's attendance record. Hammer's testimony was that the review of 12 months of timecards (extracting Penman's timecards from Respondent's records) took her 2 days: to examine the timecards, collate them, and create the spread sheet reporting that information (Tr. 530–531). Therefore it appears, and I find, that either Laquatra or Mourant requested the spread sheet on October 13 and it was not delivered into their hands until the next day, October 14. Hammer admitted that she had never been asked to prepare a spread sheet for such purposes before this occasion.

(c) Thus on October 14, after Hammer delivered the spread sheet to Mourant, he had in his possession documentation showing Penman had unexcused absences of 14 days ending with and including the alleged 3 days of unexcused absences, October 9, 12, and 13.

Sometime, therefore, on October 14, Mourant paid a second visit to Laquatra, this time in possession of the spread sheet (G.C. Exh. 6) demonstrating the forbidden 14 absences in the 12-month period. Coincidentally, however, before Mourant later visited Laquatra with the spread sheet, Peterson had already faxed Penman's medical examination records to Respondent and Respondent had received those records on October 13, a full day *before* Mourant visited Laquatra with the spread sheet and received permission to terminate Penman.

Dr. Peterson's records of this October 13 examination (G.C. Exh. 17), faxed to and received by Respondent on the same day, demonstrate that the injury occurred on October 9, 1992; that the medical examination took place on October 13; that there was a diagnosis of a right-shoulder strain; a prescription of the pain medication ''Ansaid''; a requirement for a recheck of Penman's condition on October 20; and permission for a limited return to work (with restrictions), on October 13. However, accompanying that rough document, was Peterson's signed statement that Penman would be available for work as of October 14, 1992, rather than October 13, 1992.

(d) Mourant admitted that at midnight October 14/15, at the time he discharged Penman, Penman gave him a copy of Peterson's light-duty slip showing light duty permission as of October 14, 1992 (Tr. 401). Mourant, noted infra, swore that he had never before seen that slip.

(e) On October 14, when Mourant visited Laquatra, armed with the spread sheet (G.C. Exh. 6) showing Penman's absences, however, he had received the medical records (G.C. Exh. 17; Tr. 420–422), including the light-duty slip, and he discussed these medical records with Laquatra well before he discharged Penman at midnight that night. As will be noted in particular in the next subparagraph, Mourant's continuous self-contradictory testimony makes it difficult to determine exactly when and to what extent, before the termination, he and Laquatra discussed the medical evidence supplied by Peterson. Thus, Mourant swore that he did not see the light duty slip permitting light duty on October 14 until he had *already terminated* Penman (Tr. 401–402). He then testified that he recalled a conversation with Laquatra in Laquatra's office in which he discussed with Laquatra the existence of the medical records (Tr. 417). Mourant then admitted that, as early as October 13, he possessed not only the single sheet (G.C. Exh. 9) containing the light duty instruction for October 14, but had Peterson's October 13 examination report as well (G.C Exh. 17).

(f) *Mourant's credibility*: While much of the testimony of Angelo Laquatra, Supervisor White, and Daniel Porembka was manifestly incredible, the self-contradictions of Machine Shop Manager Mourant were so widespread as to cause an otherwise garden variety pretextual defense to be unnecessarily confused.

As a preliminary matter, I had to remind this department supervisor to keep his voice up while testifying and to remember that his continued alleged inability to remember conversations was as much a statement of fact as any other fact.

His testimony with regard to certain notes he kept of the telephone conversations with Penman was particularly dis-

tressing. Penman injured his arm in the early morning hours of October 9. Mourant testified in direct and cross-examination that Penman telephoned him in the late afternoon of that same day, Friday, October 9 (Tr. 299–300, 366–367). On cross-examination, he testified that he memorialized (G.C. Exh. 15) the conversation within a couple of hours of that conversation (Tr. 368). It appears from the face of these alleged contemporaneous notes, however, that Mourant actually dated the conversation as occurring on October 12, 1992 (Monday), the day Penman testified to and *not* October 9 (Friday). Since October 12 was a Monday, and since the notes carry the date of October 12, it seemed odd that Mourant, allegedly within a few hours of the conversation, would date the *alleged*, Friday, October 9 conversation as having occurred on Monday, October 12. He insisted, however, that he wrote the notes on Friday (October 9) and that his dating the note October 12 was a mistake (Tr. 369).

It was then brought to his attention that the word ''Friday'' (next to the ''mistaken'' October 12) appeared in the same written line with his date, October 12. Mourant admitted that he had placed the word there (Tr. 369–370). ''Friday,'' transcribed on an angle different than ''October 12,'' was not placed on the document when ''October 12'' was transcribed. When the above discrepancies were called to his attention, he was asked whether, in fact, he had drafted the document on October 12 and thereafter put the word ''Friday'' next to the words October 12. He testified, in answer, that he did not ''believe'' that he had drafted it on October 12 and thereafter put the word Friday next to the incorrect date (Tr. 369). When I then urged him to ''think the matter over,'' he next testified that he did *not recall* whether he had done so (placed the word ''Friday'' into the notes at a time other than a few hours after the conversation) because ''I don't really know back that far'' (Tr. 369). He then testified that he was not ''certain'' whether he actually drafted the document on *October 12* and wrote the word Friday thereafter (Tr. 370). He ultimately testified that he believed that he had the conversation with Penman on October 9 and did not think that he wrote in the word Friday after drafting the document on October 12 (Tr. 370).

Apart from the apparent tampering and inconsistencies appearing on the face of the document and the vague and inconsistent testimony explaining them, Mourant's memorandum, which at one time he insisted was drafted by him by about 6 p.m. on October 9 (Tr. 367–368), ends with the words: ''he [Penman] called off that night.''

Penman testified that he telephoned the plant that night, October 9, at about midnight, and told an employee[29] that he had injured his arm, that he had mentioned this to Dowling who knew about the injury, and that Penman would not be to work that night. If, as Mourant testified, he memorialized (G.C. Exh. 15) this alleged October 9 conversation as early as 6 p.m., then he must have had a separate conversation with Penman before Penman spoke to the employee that night. Penman testified that he spoke *only* to the employee of October 9 and that the telephone conversation was near midnight. If Penman's testimony is credible, and I have credited it, Mourant had no such conversation with Penman on October 9. Rather, as Penman testified and as Mourant's document states in its heading, the first conversation between Penman and Mourant took place on October 12. Manifestly, Mourant could not know *at 6 p.m.* on October 9 that Mourant had ''called off'' when Penman did not call off until *midnight* on October 9.

I was also not impressed with Mourant's testimony that he pulled Penman's timecards on October 12 or 13 for ''no particular reason . . . . Just a feeling that he had missed enough time'' (Tr. 359). As General Counsel observes (Br., App. A) there were at least three or four occasions in the period 1990 through 1992 in which Penman had missed more than the required 12 days to subject himself to termination under Respondent's ''no fault'' system. His absences on those occasions resulted in no Respondent reaction. But coincidentally, in the autumn of 1992, Respondent was conducting antiunion seminars on October 10 and Laquatra had had his October 7, 1992 ''off the record'' conversation with Penman in which he was surprised at Penman's support for the Union. In short, Mourant pulled Penman's cards only after first visiting Laquatra to get the ''go ahead'' on discovering whether Penman had sufficient unexcused absences to qualify him for discharge. Insofar as Morount had ''no particular reason'' I believe he had a *particular* reason: Penman's union support and activities.

I was also not impressed with Morant's repeated failure to recall his conversation on October 14 with Vice President Laquatra concerning the effect of Peterson's medical advice that excused Penman from anything but light duty to commence no earlier than October 14. Although Mourant admitted that there was such a second conversation with Laquatra, Mourant retreated continuously into a failure to recall the substance of this second conversation (Tr. 413 et. seq.). I did not, and do not, credit his lack of recollection.

(g) *Laquatra, Porembka, and Mourant with regard to the consequences of Doctor Peterson's recommendation*

Laquatra, Porembka, and Mourant testified that they believed that Penman lied concerning his alleged injury of October 9, 1992. The ultimate reason for the alleged lie was that Penman had failed, in the 2-hour overlap period (6–8 a.m.) in the morning of October 9, in which Porembka and Mourant were present on the premises, to inform them of the injury. Mourant concedes that he saw Supervisor Dowling's writeup of the injury on the next day but asserts that Penman lied because Penman did not tell *him* of the injury.[30]

As above noted, Mourant's testimony varied from the fact that he had never seen any of Peterson's reports until after he had discharged Penman to the fact that his sworn pretrial statement showed that he had seen them as early as October 13 (Tr. 411–412) and then to a recollection that, indeed, he had discussed this matter with Vice President Laquatra be-

[29] Penman, as Laquatra admitted, was following Respondent's practice (Tr. 35–37). Respondent's otherwise admittedly incomplete call-in log (G.C. Exh. 4) shows that Penman indeed ''called off'' sick on October 9.

[30] With regard to Porembka's joining Mourant in disbelieving the extent of Penman's alleged injury, it might be noted that after Porembka wrote the glowing evaluation of Penman in July 1992, they had a severe argument, in the second week of August 1992 (Tr. 598–600) on the work floor, in which Penman threatened to take Porembka outside and beat him up (Tr. 599–600). Penman was never disciplined or warned for this conduct. There is no evidence that he was identified as a union supporter at this August date.

fore the discharge but could not remember anything of the conversation (Tr. 413).

Mourant admits that if Penman was injured on October 9 to a sufficient degree permitting him not to work on October 9, 12, and 13, then these days would be subtracted from the alleged 14 days of unauthorized absence, leaving Penman with only 11 unexcused days and therefore not subject to termination under the ''no-fault absence policy'' (Tr. 415). Mourant testified, and Respondent's brief continues to affirm (R. Br. 22 et. seq.), that Respondent could reasonably conclude that Penman suffered no injury and was lying in claiming such an injury because of his failure to inform Mourant.

Respondent points to Dr. Peterson's report of October 13 (R. Exh. 6) as demonstrating a lack of *objective* medical findings on which to base a conclusion of injury (R. Br. 23). Unfortunately for Respondent's argument, Respondent had never seen this document (Jt. Exh. 9) dated October 14, 1992, until *after* it had discharged Penman (Tr. 468). Moreover, even if Respondent had had this document in its possession, the actual diagnosis appearing in that document (which Respondent's brief fails to cite or mention) is ''strained right shoulder.'' This conclusion repeats Peterson's assertion which Respondent *did have in its possession* prior to the time it discharged Penman: for Respondent did have Dr. Peterson's faxed consultant report form (G.C. Exh. 17) a well as his light duty admonition, *before* it discharged Penman. That document (G.C. Exh. 17) has a diagnosis of ''right shoulder strain.'' This is the same diagnosis as that which appears in Joint Exhibit 9 (dated October 14, 1992) which Respondent did *not* have in its possession when it discharged Penman. The crucial point, of course, is that prior to the discharge, Respondent had Dr. Peterson's conclusion. It had no knowledge, on midnight of October 14/15, of the physical or laboratory findings on which that conclusion rested. Respondent did not know of the basis of Peterson's conclusion and particularly whether objective medical evidence supported it.

In short, therefore, Respondent's defense is that it was privileged to disbelieve the diagnosis of a specialist orthopedist, whom it specifically recommended to Penman, and whose name was posted by Respondent as the specialist to whom its employees should report in case of injury (R. Exh. 18; Tr. 621–622). Respondent's *Wright Line* defense, which effectively imposes an affirmative obligation to convince the trier of fact that the legitimate motive for the discharge existed and was sufficiently compelling, *NLRB v. Horizon Air Services*, 761 F.2d 22 (1st Cir. 1985), requires that that burden be supported by a preponderance of the credible evidence, *Merillat Industries*, 307 NLRB 1301 (1992). In and of itself, Respondent's position, rejecting the conclusion, after physical examination, of its own orthopedic specialist, is not credible, much less preponderantly compelling, in the presence of a prima facie case. To reject the postexamination diagnosis of one's own medical specialist requires some reasonable support, apart from merely doubting his findings, and substituting Mourant's and Laquatra's intuition for the experience and judgment of an orthopedic specialist.

And what is the basis for Respondent's intuitive refusal to accept the conclusions and diagnosis of its own orthopedic specialist? It is the testimony of Mourant, Laquatra, and Porembka: that although Penman timely and correctly notified his shift supervisor of the injury, he did not mention it to Porembka or Mourant in the 2-hour overlap period which they shared on Friday morning, October 9.

What actually prompted Respondent to rely on Mourant's, Laquatra's, and Porembka's intuitive disbelief in the injury was its October 13 receipt, after the October 13 decision to discharge Penman, of Dr. Peterson's diagnosis and recommendations (G.C. Exh. 17). It was the October 14 conversation between Mourant (whose recollection was vacant on this matter) and Laquatra, with Mourant and Laquatra in possession of Dr. Peterson's October 13 fax, which prompted the necessity for an immediate, contrived, and false defense: to disbelieve Dr. Peterson's diagnosis. This conclusion is based in part on Mourant's own record of his conversation with Penman (G.C. Exh. 15) which follows.

Regardless of Mourant's variable testimony concerning when his conversation with Penman occurred—whether it was October 9 or 12—there is no question that Penman complained of having injured his shoulder and Mourant responded by blaming Penman for his own injury (G.C. Exh. 15): ''if he had followed proper procedures for loosening bolts and used a pipe for leverage his shoulder would be fine. . . . I told him to get some help putting tooling on the line if he needed it . . . [when he said he would be in that night] he asked would it be okay to take Darvocet to ease the pain? and I said no because of Company liability!'' (G.C. Exh. 15.) If Mourant had any question, whether on October 9 or even October 12, of the bona fides of Penman's injury, he might reasonably have inquired of Penman, in that conversation, and recorded in his alleged contemporaneous notes (G.C. Exh. 15), *not* whether Penman was faking, but simply why Penman had not reported the injury to him, or to Porembka, while they shared the overlap of 2 hours (6 to 8 a.m.) on the Friday morning shift (8 a.m. to 4 p.m.). There is no suggestion even in Mourant's *testimony* that he made such an inquiry to Penman in the phone conversation and, of course, he failed to *record* any such inquiry in his alleged contemporaneous notes (G.C. Exh. 15)

If Penman's failure to notify Mourant (and Porembka) of the injury was the dispositive basis for their doubt of his bona fides, it was certainly unnecessary for either of them to mention this doubt to Penman before he left work early Friday morning without notifying them. Rather, in Penman's subsequent phone call to Mourant, 10 or more hours later (if Mourant's notes were recorded on October 9) or 72 hours later (if recorded on October 12), Mourant might be expected to have inquired merely why Penman failed to notify either of them of the injury notwithstanding that he properly and adequately notified Supervisor Dowling. Again Mourant's notes of the phone conversation contain no hint of such a question; nor did Mourant testify that he asked Penman why he did not notify him before leaving.

All the above demonstrates that the false reason of ''failure-to-notify'' Mourant was contrived sometime after October 12 (which is the date on which I have found Mourant to have recorded G.C. Exh. 15) and indeed was contrived after October 13 receipt of Peterson's medical diagnosis. It was contrived on October 14 in order to proceed with the determination of the day before (October 13) to discharge Penman in the face of the later receipt of Dr. Peterson's medical diagnosis and recommendation.

Contemporaneously, Respondent had offered to promote Penman to the position of assistant production manager.

While there is no question that Penman's skills and ability merit such promotion, overcoming strenuous Porembka objections, the effect of such a promotion would take Penman out of the production and maintenance unit. He would no longer be an employee protected by Section 7 of the Act. He would then be engaged in prounion activities at his peril when promoted to such a supervisory position. Whether Respondent's motive was to bribe him by such a promotion and cause him thereby to lawfully refrain from such union activities; or, perhaps, contained a more ominous element, i.e., to promote him and then discharge him for union activities, compare *NLRB v. Bell Aircraft Corp*., 206 F.2d 235, 237 (2d Cir. 1953): ''The Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected''), the effect, in any case, is a promotion offered to an outstanding employee. This October 2 contemporaneous offer of promotion, with full knowledge of and in spite of Penman's dangerous attendance record, is simply not consistent with discharging him on October 14 under the no-fault plan. If anything, it is evidence of President Felt's implied condonation of Penman's attendance record through the end of September 1992.

In sum, the sole basis for concluding that Penman had violated the ''no-fault'' absentee policy, was the 3 days of absence due to an alleged shoulder injury which brought him from a permitted 11 days of absence in the 12-month period to a prohibited 14 days of absence. Those 3 days, in turn, rest solely on Respondent's disbelief of its own orthopedic specialist's evaluation and diagnosis. The alleged sole basis for Respondent's disbelieving its own medical specialist is Penman's failure to report that injury to either Mourant or Porembka in the 2-hour overlap period. Notwithstanding that Penman lawfully and accurately advised his shift supervisor (Chuck Dowling) of that injury at the time of its occurrence on October 9, Mourant, who recommended the discharge for Penman's violating the ''no fault'' absentee policy, never mentioned it to Penman when he had the full opportunity to do so in his October 9 or 12 phone call from Penman. Nor did he later record Penman's failure in his record of the conversation. Rather, the evidence, so far as it is available and reconstructible, demonstrates that Respondent falsely contrived this defense after it had determined to terminate Penman on October 13 but then received Dr. Peterson's faxed medical diagnosis. This diagnosis, tending to support the bona fides of Penman's alleged injury, would prevent Respondent from adding Penman's 3 days' absence (October 9, 12, and 13) to the existing 11 days of absence, bringing him into an area forbidden by the ''no-fault'' absentee policy. Thus, to rid itself of the inconvenient medical evidence, there arose the necessity to concoct the defense of disbelieving Peterson's diagnosis and the bona fides of the injury.

While, as Respondent observes, Penman's testimony is not a model of credibility or veracity, I accepted much of it not only because of the probability that it was reasonably direct and truthful, but because of the uninterupted demonstrations of Respondent's witnesses' lack of veracity in dealing with the same subject matter. This lack of veracity flowed, in my opinion, principally from their contradicting otherwise credible, independent witnesses with regard to their commission of unfair labor practices in violation of Section 8(a)(1) of the Act; from Mourant's dazzling performance on the witness stand and his failure to exaplain away the inconsistencies of his alleged contemporanious notes (G.C. Exh. 15); from Laquatra's and White's incredibility and the clear strength of General Counsel's prima facie case. In no event can Respondent be said to have demonstrated its defense on the basis of preponderant credible evidence. Especially in view of Respondent's repeated failure to apply its own ''no fault'' absentee rule to Penman's past absences in the period 1990–1992 and its admitted failure to provide him with timely warnings under the same handbook rule, I find it unnecessary, on this record, to inquire into General Counsel's proof with regard to Respondent's disparate treatment of Penman compared to its other employees.[31]

If Respondent's defense is that the ''no fault'' rule was automatic in its application, then the defense is rejected as unproven: (a) the supervisors, including Laquatra and Mourant, had discretion in determining whether the absences should be excused (as Laquatra admitted); (b) the rule was not applied to Penman on the several occasions in which his absences exceeded 12 days in 12 months in the period 1990–1992 (G.C. Br., App. A); and (c) Laquatra failed to save his drinking buddy, in spite of any other supervisor's recommendation, on the ground of treating all employees ''fairly.'' In any event, the defense is purely pretextual since the addition of the 3 days of absence was based on Mourant's belief that the injury was faked because not reported to him, in the overlap period. This belief, rejecting the medical conclusion of Respondent's own specialist, was invented in order to explain rejection of Dr. Peterson's medical conclusion. Mourant allegedly held this belief in the face of Penman properly and timely reporting the injury pursuant to Respondent's rules and, most important, Mourant's failure to mention this allegedly dispositive Penman oversight either to Penman, or in his ''contemporaneous'' notes regarding this very injury, recorded on October 12, long after Penman's oversight. If Penman's *failure to report* was so important, Mourant would have mentioned it to Penman or in his record. (I am not suggesting that either Mourant or Porembka should have mentioned to Penman their doubts as to the bona fides of the injury.)

When these facts are placed alongside Respondent's unconvincing lateness and absentee record system, the admitted failure to enforce its own rules and particularly to timely warn Penman, the heaping of untimely warnings on him at the moment of his discharge, the unique creation of the spread sheet to discover his total absences, the intuitive rejection of Dr. Peterson's conclusion, Mourant approaching Laquatra merely when he suspected that Penman was getting ''close'' (to the prohibited 12 absences) and the unique, midnight appearance of the entire supervisory hierarchy at Pen-

[31] Respondent's proof with regard to its treatment of former Production Manager Jim Bentley is irrelevant. While it is true that Bentley, a supervisor, was equally subject to Respondent's ''no fault'' absentee policy, as were its employees, Respondent's offer to prove treatment similar to Penman by its discharge of Bentley was a misfire. The evidence showed that Bentley was *not* fired pursuant to the ''no fault'' absentee policy, but, rather, was discharged because he was unwilling to work an adequate number of hours to fulfill his job as production manager. Respondent's introduction of their irrelevancy further weakened its defense of attempting to show equal, automatic enforcement of its rule.

man's October 14 discharge while his light work was waiting for him, the ''no-fault'' defense loses its probity.

In the end, Laquatra failed to use his undoubted power to save his old drinking buddy—a superlatively skilled, devoted, and reliable employee—in order to treat all the employees ''fairly.'' He acted ''fairly'' toward his old friend by overruling the diagnosis of Respondent's own orthopedic specialist and dispositively crediting Mourant's wholly contrived suspicion that Penman faked the injury because it was reported only to Supervisor Dowling and not to him. This defense is not credible. I need not and do not make any finding regarding the nature and extent of Penman's arm injury. I find only that Respondent's rejection of the medical evidence is false and wholly pretextual.

The preponderant credible evidence of motive is elsewhere; I find that the Consel for the General Counsel has proved her case. Instead of showing gratitude for his training and advancement (including the offer of supervisory promotion which would have halted his union activities), Penman supported the Union. Respondent's retaliation, perhaps understandable, is unlawful.

3. Violation of Section 8(a)(1)

The ''futility'' of employees engaging in union activity: Lastly, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by informing its employees that it would be futile for them to select the Union as their bargaining representative.

The exclusive basis for the General Counsel's allegation of unlawfully advising employees of the futility in their selecting a union is Joint Exhibits 4 and 5. Respondent concedes that these documents admittedly contained strong statements of Respondent's opinion that employees choosing the Union would be a mistake (R. Br. 36). On October 14, 1992, the day on which it unlawfully terminated Penman, it sent a letter (Jt. Exh. 4) to all its employees in which, attempting to contradict alleged union prapaganda and mistatements, it stated:

> THE TRUTH IS AS FOLLOWS:
>
> FACT: Only the Company can raise wages. All the union can do is call a strike in an attempt to force the Company to do something.
>
> Further ''facts'' asserted by the Company include (1) by striking, the union is gambling with its members' future, hoping that it can shut off shipments to the employees' customers to gain leverage in a negotiation; (2) [Respondent] is unique in that it is a member of the Rooyal [sic] Plastic Group. If our production is interrupted in Delmount, our customers can easily be supplied from other plants, both in the United States and Canada. And (3) once negotiations starts, all things are negotiable and wages and benefits can and often do go down because the union ''trades and benefits'' can and often do go down because the union ''trades them'' for other things like a union security or dues check-off provision.

The General Counsel urges that this message implies to employees that union representation is futile as the Union cannot improve employees' wages except by striking (G.C. Br. 27). Respondent defends (R. Br. 36–37) on the ground that nowhere does this document, or its sister document of October 20, state that a strike would be inevitable.

These facts, however, appear to come within the decision in *Seville Flexpack Corp*., 288 NLRB 518, 534–535 (1988). In that case, there had been a reference to bargaining in good faith in a prior employer statement. In the statement alleged to be a violation, however, the employer said that the union, which had not presented any demands, would have to strike to be heard. This statement, in conjunction with the employer's assertion that only it could raise wages, implied that the union would either have to agree to Respondent's offer or to strike. This amounted to a statement of employer intransigence. Rather than economic necessity or the give and take of negotiations, the employer alone would determine the raise in wages, if any, thus rendering it useless to support the union. See *NLRB v. Gissel Packing Co*., 395 U.S. 575, 619 (1969); *E. I. Dupont & Co*., 263 NLRB 159, 165–166 (1982).

In the instant case, Respondent similarly said that ''only the Company can raise wages, all the union can do is call a strike in an attempt to force the Company to do something.'' As in *Seville Flexpack Corp*., supra, such a statement of futility may be found since, in *Seville Flexpack Corp*., the employer said that the union can make all the demands it wants, but the employer does not have to agree to a thing. The employer alone would determine wages. In the instant case, Respondent said the same thing. The charging party's sole available response, according to Respondent, is not bargaining, but a strike.

On these facts, Respondent violated Section 8(a)(1) of the Act by informing its employees it would be futile to select the Union as their bargaining representative.[32]

Respondent's defense that it nowhere stated that a strike would be inevitable is not controlling in the face of Respondent's statement itself that: ''all the union can do is call a strike in an attempt to force the Company to do something.''

CONCLUSIONS OF LAW

1. Custom Window Extrusions, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Electrical, Radio and Machine Workers of America (UE) (the Union) has been and is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by and through its supervisors, in the period September and October 1992, coercively interrogated its employees regarding their union membership, activities, and sympathies and the union membership, activities, and sympathies of their fellow employees in violation of Section 8(a)(1) of the Act.

4. Respondent, in September and October 1992, by its supervisors Robert White and Angelo Laquatra, in violation of Section 8(a)(1) of the Act, threatened its employees with the closing of Respondent's facility if they supported the Union.

[32] In view of my conclusions that Laquatra, on October 7, 1992, in his conversation with Penman, unlawfully solicited employee complaints and grievances and implied a promise to meet those complaints and grievances in order to thwart employees' support for the Union, I need not determine whether the posted notice of October 20 reached the same result.

5. Respondent, by its Supervisor Angelo Laquatra, on or about October 7, 1992, solicited employee complaints and grievances, impliedly promised both increased benefits and improved terms and conditions of employment in order to thwart the employees' support for and sympathy with the Union, all in violation of Section 8(a)(1) of the Act.

6. Respondent, by its President Ernest Felt, in his letter to employees of October 14, 1992, informed its employees that it would be futile for them to select the Union as their bargaining representative in violation of Section 8(a)(1) of the Act.

7. On or about October 7, by Supervisor Angelo Laquatra, Respondent informed its employees that unionization would have a detrimental result with respect to the employees' terms and conditions of employment thereby violating Section 8(a)(1) of the Act.

8. On or about October 14, 1992, Respondent, by its machine shop manager, Mourant, its vice president Laquatra, its production manager Porembka, and its supervisor, Leonard Feather, unlawfully discplined and on the same date unlawfully discharged its employee, Robert Penman, because he engaged in union activities and in order to discourage him, and other employees, from engaging in such activities thereby unlawfully discriminating against him, and them, in violation of Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, I recommend to the Board that it order the Respondent to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act. In addition to posting notices which prohibit repetition of Respondent's violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent make Robert Penman whole for any loss of earnings and benefits he may have sustained by virtue of Respondent's unlawful discharge of October 14, 1992, to be computed in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

The Respondent, Custom Window Extrusions, Inc., Delmont, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating against employees in order to discourage them from joining or supporting United Electrical, Radio and Machine Workers of America (UE) or any other labor organization.

(b) Coercively interrogating its employees regarding their union membership, activities, and sympathies and the union membership, activities, and sympathies of their fellow employees.

(c) Threatening its employees with closure of the plant if they supported the Union; soliciting employee complaints and grievances and impliedly promising to rectify them by improving benefits, terms, and conditions of employment; threatening employees with nonspecfic threats of reprisals if the Union came in; and informing them of the futility of their selecting the Union, or any other labor organization, as their collective-bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Robert Penman immediate and full reinstatement to his former position of employment at the Delmont, Pennsylvania location, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, and make him whole, with interest, for any loss of earnings and benefits he may have suffered as a result of Respondent's October 14, 1992 unlawful discharge all as set forth in the remedy section of this decision.

(b) Expunge and remove from its file any memoranda, records, or other references to any oral or written warnings or discharge of Robert Penman commencing September 1992 and ending October 14, 1992, and notify him, in writing, that this has been done and that these disciplinary actions will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination or copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its faciities located in Delmont, Pennsylvania, copies of the attached notice marked ''Appendix.''[34] Copies of the notice on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''